

T W O

TRIALS

B E F O R E

The Judge of the High Court of
Admiralty of Scotland,

I. The TRIAL, at the Instance of *Duncan Forbes of Culloden Esq;* His Majesty's Advocate, and Mr. *Hugh Forbes* Advocate, Procurator-fiscal of the said High Court;

Against *James Long* Corporal, and *Thomas MacAdam* Soldier, in the Regiment commanded by Colonel *Archibald Hamilton*.

II. The TRIAL, at the Instance of *Duncan Forbes of Culloden, Esq;* His Majesty's Advocate, and Mr. *Hugh Forbes* Advocate, Procurator-fiscal of the said High Court ;

Against *Duncan Grant* junior Merchant in *Inverness*, *Evan MacKinnon* Shoemaker there, *John MacDonald* Messenger there, and *Murdoch MacRae* Horse-hirer there.

*Published by Allowance of the JUDGE of the said
HIGH COURT.*

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THE
TRIAL
IN THE
High Court of Admiralty
IN
SCOTLAND,

At the Instance of *Duncan Forbes*
of *Culloden*, Esq; his Majesty's Advocate,
and *Mr. Hugh Forbes* Procurator-Fiscal
of the said High Court,

AGAINST

James Long Corporal, and *Thomas MacAdam* Soldier,
in the Regiment commanded by Col. —
Hamilton.



EDINBURGH:

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THE TRIAL, &c.

*Curia Jusficiaria Supremæ Curie Admiralitatis, tenet
in Prætorio Burgi de Edinburg, decimo septimo die
mensis Septembris, MDCCXXXV. per honorabilem vi-
rum Jacobum Graham de Airib Judicem dictæ curiæ,*

Curia legitime affirmata.

*Entrant Thomas MacAdam and James Long Pannels,
both of them indicted and accused at the Instance
of Duncan Forbes, Esq; his Majesty's Advocate,
and Mr. Hugh Forbes Advocate Procurator-Fiscal
of the said High Court, for the Crime specified in
Manner mentioned in the Criminal Letters raised
against them thereanent, in Manner underwritten.*



GEORGE, by the Grace of GOD,
King of Great Britain, France and
Ireland, Defender of the Faith, To

Officers and Serjeants of Our High Court of Admi-
nistratio, conjunctly and severally, specially constitute,
Greeting,

Greeting. FORASMUCHAS'tis humbly meant and complained to Us by Our Right Trusty *Duncan Forbes*, Esq; Our Advocate, and Mr. *Hugh Forbes* Advocate, Procurator-Fiscal of Our High Court of Admiralty, for his Interest, upon *Thomas MacAdam* Soldier in the Regiment of Foot commanded by Colonel

Hamilton, at present Prisoner in the Tolbooth of *Edinburgh*, and *James Long* Corporal in the aforesaid Regiment; THAT WHERE, by the Laws of GOD, of this and all other well governed Realms, the atrocious Crime of Murder, or Man-slaughter, is most hainous, and severely punishable; YET TRUE IT IS, That the saids *Thomas MacAdam* and *James Long*, and each, or one, or other of them, are guilty, Actors, Art and Part of the said most hainous Crime, IN SO FAR AS, shaking off all Fear of GOD, and Regard to the Laws of this Realm, AND having, without any just Provocation, conceived a deadly Malice against the decest *Hugh Frazer* younger of *Bellmain*, Merchant in *Inverness*, upon the Fourth Day of *June*, One thousand seven hundred and thirty five Years, or one or other of the Days of the said Month, or upon one or other of the Days of the Months of *May* preceeding, or *July* following, they, with several other Persons then in Company with them, armed with Guns, Bayonets, Blunderbushes, and other hostile and mortal Weapons, came in an open Boat off the Shore of *Nairn*, on the High Seas, and there having espied the said Defunct in another Boat, they, the said *Thomas MacAdam* and *James Long*, and others in Company, thereupon rowed the Boat wherein they were, straight Way upon the Boat wherein the Defunct was; AT LEAST the said Boat, wherein the said *Thomas MacAdam* and

James

James Long were, came up with the other Boats wherein the Defunct was, And so soon as the saids *Thomas MacAdam* and *James Long* came near the said Boat, they screw'd their Bayonets upon their Guns, and cocked the same, which were loaded, AND in Prosecution of their Intention to murder, upon the two Boats approaching and coming close together, they kept their Guns level'd against that Part of the Boat where the Defunct was, AND so soon as the said *Thomas MacAdam* and *James Long* came within Reach, push'd with their screwed Bayonets several Times at the Defunct, who was unarmed, and perfectly defenceless, altho' the said Defunct had before that Time called out to use no Violence, and not fire, for he and all the Crew with him were in the Will of them the saids Pannels, and other Persons with them in the Boat, and that they might come on board, or Words to that Purpose; AND altho' in the Morning of the said Day, the saids *Thomas MacAdam* and *James Long* knew that no Resistance had been made, when they, with others, came on Board another Boat wherein the Defunct was: NEVERTHELESS they, contrary to the Advice given them by one of the Persons with them in the Boat, *not to be rash*, continued their Attacks upon the Defunct, AND the Boats being close together, he the said Defunct had no other Way to escape instant Death, than by catching hold of the Muzels of their Guns, and holding them up so as to prevent any Mischief, in case they had discharged the same; AND having thus caught hold of the Guns for his own Preservation, he, without any Weapons, step'd, or was pull'd into the Boat where the saids *Thomas MacAdam* and *James Long* were, and endeavouring still to keep hold of the Guns, the Struggle

Struggle occasioned thereby, or the Motion of the Boat, threw them the saids Pannels, with the Defunct down in the Boat, at or about which Time, he, the said *Thomas MacAdam*, most feloniously, AND with a murderous Design, unscrewed the Bayonet off the Muzel of a Gun, AND therewith most cruelly gave the Defunct a Stab or Wound in the Breast, of which Wound he very soon thereafter died, and he the said *Thomas MacAdam* was seen at the same Time wash the Blood from his Bayonet. And as a further Evidence of his barbarous and wicked Intention, he declared, That would the Defunct come again into the Boat, he would give him what he came for, and what he got before: And no sooner did they the said *James Long* and *Thomas MacAdam* Pannels, or one or other of them, perceive this, then they, in order to bereave the Defunct of his Life, threw the said Defunct, then in a helpless Condition, over Board into the Sea; and when he caught hold of the other Boat, he the said *James Long*, in order to beat him down, barbarously and violently struck the Defunct with his Gun, so that the Violence of the Stroke broke the Iron Ram-rod thereof; and the Defunct being taken out of the Sea into the Boat where he first was, died in a few Minutes thereafter. From which Facts and Circumstances it is plain, that they the said *Thomas MacAdam* and *James Long*, and each of them, are guilty, Actors Art and Part of the said Crime of Murder, or wilful Man-slaughter: AT LEAST, at the Time and Place above mentioned, the said *Hugh Fraser* did receive a Wound in the Breast, by a Bayonet, Sword, Durk, or other mortal Weapon, and a severe Blow, of which Wound or Blow he instantly died, and they the said *Tho-*

mas Mac Adam and *James Long* are guilty, Actors
 Art and Part of giving the said Wound and Blow:
 WHICH CRIME, or their being guilty, Actors
 Art and Part thereof, being found proven by the
 Verdict of an Assize, before the High Court of Ad-
 miralty of *Scotland*, to be holden at *Edinburgh*, the
 seventeenth Day of *September* next, the said *Tho-*
mas Mac Adam and *James Long* ought to be pu-
 nish'd with the Pains of Law, to the Example and
 Terror of others to commit the like in Time com-
 ing. OUR WILL IS HEREFOR, and We
 charge you strictly, and command, that incontinent
 thir Our Letters seen, ye pass, and in Our Name
 and Authority, command and charge the said
Thomas Mac Adam, presently Prisoner in the Tol-
 booth of *Edinburgh*, to compear before the Judge
 of Our High Court of Admiralty, within the Tol-
 booth or criminal Court-house of Admiralty at
Edinburgh, the said seventeenth Day of *September*
 next to come, in the Hour of Cause, there to un-
 derly the Law, for the Crime above mentioned, to
 the Effect, that being convicted thereof, Justice
 may be administrate upon him, conform to Law.
 And sikklike, That ye in Our said Name and Autho-
 rity, command and charge the said *James Long*, above
 complain'd upon, to compear, and to come and find
 sufficient Caution and Soverty, acted in the Books
 of Adjournal in the High Court of Admiralty, that
 he shall compear before Our said Judge of the High
 Court of Admiralty, within the Tolbooth or crimi-
 nal Court-house of Admiralty at *Edinburgh*, the
 said seventeenth Day of *September* next to come, in
 the Hour of Cause, there to underly the Law for
 the Crime above mentioned, and that under the
 Pains contained in the Acts of Parliament; and
 that

that ye charge him personally, if he can be apprehended, and failing thereof, at his Dwelling-place, and by open Proclamation at the Market Crosse of the Head Burgh of the Shire, Stewartry, Regality, or other Jurisdiction where he dwells, to come and find the said Caution and Soverty, acted in Manner foresaid; within fifteen Days next after he be's charged by you thereto, under the Pain of Rebellion, and putting of him to our Horn; wherein if he faillie, the said fifteen Days being bygone, and the said Soverty not found, nor no Intimation made by him to you of the finding thereof, that incontinent thereafter ye denounce him Our Rebel, and put him to Our Horn, escheat and inbring all his moveable Goods and Gear, to Our Use, for his Contempt and Disobedience; and that ye within fifteen Days thereafter, cause registrate thir Our Letters, with the Executions thereof, in Our Books of Adjournal in the High Court of Admiralty, conform to the Act of Parliament; and if he come and find the said Caution and Soverty, acted in Manner foresaid (Intimation being always made by him to you of the finding thereof) that ye summon an Affize, to pass upon the Trial of the said *Thomas MacAdam* and *James Long*, not exceeding the Number of forty five Persons, together with such Witnesses as best know the Verity thereof, whose Names shall be given you in a List, subscribed by the said *Duncan Forbes* Our Advocate, or the said Procurator-fiscal; All to compear before Our said Judge, Day and Place foresaid; the saids Persons of Inquest to pass upon the Affize of the said *Thomas MacAdam* and *James Long*, and the said Witnesses to bear leal and soothfast Witnessing against him, ilk Person under the Penalty of One hundred

hundred Merks; according to Justice, as ye will answer to Us thereupon: The which to do we commit to you conjunctly and severally Our full Power, by thir Our Letters, delivering them by you duly execute, and indorsed again to the Bearer. Given under our Signet of Admiralty at *Edinburgb*, the twenty first Day of *August* 1735.

Ex Deliberatione Judicis supremæ Curie Admiralitatis.

ALEX. JOLLY Depute.

A LIST of Assizers, to pass upon the Assize of the above designed Thomas MacAdam and James Long.

B Ailie Thomas Dundas Merchant in *Edinburgb*,
John Coutts Merchant there,
Alexander Tait Merchant there,
Walter Davidson Sadler there,
Archibald Steuart Merchant there,
Alexander Symmers Bookseller there,
John Nairn of *Greenyards* Merchant there,
Edward Marjoribanks Merchant there,
Walter Boswal Sadler there,
Andrew Gray Wigmaker there,
William Monro Bookseller there,
Thomas Arbuthnot Merchant there,
Peter Gordon Watchmaker there,
Peter Rofs Mefchant there,
Captain David Daes Shipmaster in *Leith*,
Captain Peter Hay Shipmaster there,
William Cumming Merchant in *Edinburgb*,
Captain John Robertson Merchant there,
George Campbell Wright there,
William Gray Vintner there,

James

James Hog Merchant in *Edinburg*,
 Gilbert Haliburton Merchant there,
 Alexander Anslie Merchant in *Leith*,
 James Sutherland Merchant there,
 John Carnegie Merchant in *Edinburg*,
 George Falconer Merchant there,
 James Hamilton Wigmaker there,
 David Carmichael Merchant there,
 James Steuart Merchant there,
 James Tait Goldsmith there,
 Colin Campbell Shipmaster in *Leith*,
 Peter Robertson Ship-carpenter there,
 Mark Sandilands Merchant in *Edinburg*,
 Thomas Craig Tobacconist there,
 Walter Muscier Vintner there,
 John Hay Wigmaker there,
 William Graham senior Merchant there,
 James Gilchrist Merchant there,
 Hugh Penman Jeweller there,
 Adam Davie Merchant in *Leith*,
 David Scot Merchant in *Edinburg*,
 Gavin Drummond Bookseller there,
 Alexander Kincaid Bookseller there,
 Thomas Gibb Shipmaster in *Leith*,
 William Wight Baxter in *Edinburg*.

JAMES GRAHAM.

*LIST of Witnesses to pass upon the
 Trial of Thomas MacAdam and James
 Long above designed.*

Duncan Grant junior Merchant in *Inverness*,
 John MacDonald Messenger there,
 John Fraser Cooper there,
 Evan MacKinnon Shoemaker there,

Murdoch

(11)

Murdoch MacRae Horse-hirer in *Inverness*,

William Fraser,

James Fraser,

David Ross,

Alexander Bain,

William Reoch,

Donald Fraser,

Robert Grant,

Edward Townsend Landwaiter at *Inverness*,

John Brodd Soldier in Colonel

milton's Regiment of Foot,

Alexander Urquhart,

Alexander Wright,

Donald Dingwal,

Andrew Kay,

Walter Denoon,

} all Fishers and Boatmen in
} *Tarbat* in the Shire of
} *Ross*.

} all Boatmen of the
} Custom-house Boat
} at *Inverness*.

HUGH FORBES.

Pursuers, Mr. Hugh For

bes Advocate, Procu-

rator-fiscal.

Mr. Alexander Lockhart

Advocate.

} Procurator in Defence

} Mr. Hugh Dalrymple.

THE Grounds of the Criminal Libel and Indictment, at the Instance of *Duncan Forbes, Esq;* his Majesty's Advocate, and Mr. *Hugh Forbes* Advocate Procurator Fiscal of the High Court of Admiralty, against *Thomas M Adam* and *James Long* Pannels, being fully debate *viva voce*, the Judge of the High Court of Admiralty continues the Diet at the Instance of his Majesty's Advocate and Procurator Fiscal, till *Thursday* the 25th of *September* current, at Ten of the Clock in the Forenoon, and ordains both Parties to give in their Informations be-

B 2

twice

twixt and that Time, the Pursuers to give in theirs betwixt and *Friday* next, at Six o'Clock at Night, and the Pannels to give in theirs betwixt and *Tuesday*, at 12 o'Clock in the Forenoon, in Order to be recorded in the Court Books, and ordains Affizers and Witnesses to attend the said Diet, ilk Person under the Penalty of one hundred Merks, and the Pannels to be carried to Prison.

JAMES GRAHAM.

The Procurator Fiscal thereafter represented, That *Thomas M'Adam*, one of the Pannels, had taken out Letters of Intimation from the Justiciary, which is not a competent Court, and that the Days were near run, and desired the Pannel would declare if or not he intended to plead the Benefit of these Letters.

Dalrymple, for the Pannel, declared he past from any Benefit that might be competent to him, in Virtue of any such Letters, and is willing his Client sign the passing from the same.

Compeared the said *Thomas M'Adam*, and judicially passes from any Privilege or Benefit he may have, in Virtue of the Letters of Intimation taken out by him from the Court of Justiciary, and consents that the Criminal Trial or Indictment at his Majesty's Advocate and the Procurator Fiscal of Court their Instance, go on against him in the ordinary Form and Diets of Court, as if no such Letters had been taken out and execute by him.

THO. M'ADAM.

JAMES GRAHAM.

19th September, 1735.

INFORMATION for His Majesty's Advocate, and Mr. Hugh Forbes Advocate Procurator-Fiscal of the High Court of Admiralty;

Against Thomas M'Adam and James Long, Pannels.

BOTH the said Pannels are accused before the Judge of the High Court of Admiralty, as guilty, Actors, Art and Part of a most barbarous Murder committed upon the deceas'd *Hugh Fraser* younger of *Bellnain*, Merchant in *Inverness*; and the Fact, as charged in the criminal Libel, is, "That upon the 4th Day of *June* last, the said *Hugh Fraser* being then with some others, all of them unarmed, in an open Boat upon the High Seas off the Shore of *Nairn*, in Prosecution of their lawful Business, and offering Violence or Disturbance to no Person, were made up to by the Custom-house Boat, having on board several Persons, and amongst these the Pannels, who upon their first Appearance were discovered to be armed with Guns and screwed Bayonets, and which Guns afterwards appeared to have been charged, and were then cocked and levelled against that Part of the other Boat where the Defunct stood: That upon the two Boats coming clofs together, and so soon as the said *Thomas Macadam* and *James Long* came within Reach, without giving the least Intimation of their Design, other than what was to be dreaded

“ dreaded from their outward Appearance, and with-
 “ out demanding or endeavouring to force Admis-
 “ sion into the other Boat, the first Salutation giv-
 “ ven was, a Thrust made by each of the said Pan-
 “ nels with their screwed Bayonets against the De-
 “ funct, who then unluckily happened to stand on
 “ the Side of the other Boat opposite to them ; the
 “ at the same time it is said in the Libel, and was
 “ be proven, That how soon the two Boats came
 “ near as to be in speaking Terms, the Defunct cal-
 “ led out to the Pannels *to use no Violence, and not*
 “ *fire, for that be and the others in Company with*
 “ *him were in their Will*: Notwithstanding of which
 “ the Pannels, in execution of their premeditated
 “ Malice, and contrary to the Advice of their own
 “ Companions, did, without the least Provocation
 “ Resistance, or so much as attempting to board the
 “ other Boat, begin the Attack in manner libelled
 “ and by these two Thrusts would then have un-
 “ doubtedly bereaved the Defunct of his Life, had
 “ he not found Means to evade the Thrusts, at the
 “ same time catching hold of the two Guns, and
 “ holding them up so as to prevent Mischief, in
 “ case they had discharged them ; and in the Strug-
 “ gle which ensued upon this, the two Pannels de-
 “ ceavouring to pull away and recover the Gun
 “ and the Defunct keeping his Grip, the Custom-
 “ house Boat being then on Float, the Defunct was
 “ either pulled, or forced to step into the Custom-
 “ house Boat, not daring to let go his Hold of the
 “ Guns, and stand the chance of other two Thrusts
 “ in which Struggle, or by the motion of the Boat
 “ all the three fell to the Ground ; whereupon the
 “ said *Thomas Macadam* did deliberately unfasten
 “ the Bayonet from off his Gun, and therewith gra-

the Defunct a mortal Wound in the Breast, of which he immediately fell down, and probably would have died: But the Pannels not satisfied with the Barbarity already committed, and in further Prosecution of their premeditate Design to murder, did in a most cruel and barbarous Manner toss the Defunct, then in a helpless Condition, over board into the Sea, and upon his catching hold of his own Boat, and endeavouring so to save himself from drowning; the Pannel *James Long* struck him down with his Gun, with such Violence that the Iron Ram-rod was broke by the Force of the Stroke; of which Wound and Stroke the Defunct died in a few Minutes, being taken up in to his own Boat." From all which, the Libel concludes most relevantly, That the Pannels, and each of them, are guilty, Actors, Art and Part, of the Crime of *Murder* with which they are charged, and ought therefore to underly the Pains of Law.

No Objection was offered in Behalf of either of the Pannels to the Form of the Libel, neither did the Procurators for *Thomas Macadam* object to the Relevancy, in so far as regarded him; but did admit, That he being charged as guilty of Murder, by giving that Thrust or Wound in the Breast, of which the Defunct died, the Trial must proceed. But in so far as regarded *James Long*, the other of the Pannels, and the Relevancy of the Libel *quoad* him, it was said, That the Prosecutors having in the Libel acknowledged, that the Wound which the Defunct received in his Breast was given by *Thomas Mac-adam* the other of the Pannels, and that the Defunct very soon thereafter died of the said Wound, it followed as a necessary Consequence, that the actual Murder could not be charged on

James

James Long ; and however culpable he might have been, if truly guilty of tossing the Defunct over board into the Sea, after having received and being disabled by the Wound in his Breast, and thereafter knocking him down with his Musket, when endeavouring to save himself from drowning ; yet as these Facts would not infer Murder, and did amount at most but to an *atrocious Riot*, which was no Part of the Crime here charged ; therefore it was subsumed, “ That the Libel, in so far as it concludes only actual Murder, could not be found “ relevant against *James Long*.”

To this it was answered for the Prosecutors, That the Libel was equally relevant against both the Pannels, and behoved to stand or fall in whole ; for that it expressly bears, *that both the Pannels are guilty, Actors, Art and Part of the Crime of Murder* ; and then proceeds to set forth the particular Way and Manner in which the Murder was committed : In either of which Respects the Libel was most relevantly laid against both the Pannels. The actual Murder is charged against both, which is all that is requisite to establish the Relevancy of a Libel founded upon that Crime : The Way and Manner how that was committed is in the Proof, and will come under the Cognizance of the Jury. Neither is it of any Moment, that in the Subsumption of that Part of the Libel relative to *Thomas Macadam*, the Defunct is said to have died of the Wound given by him, because it will be observed both the Pannels are separately libelled as *Art* and *Part* in the Murder, which by special Statute is declared *per se* relevant in all Cases, without any particular Condescendence. What Circumstances are suffi-

ent to infer *Art* and *Part*, must depend upon the Proof, and lies before the Jury.

Upon this Point it was likewise pled in Behalf of *Thomas Macadam*, That *James Long* the other Pannel, being a necessary Witness for him, to prove the Way and Manner how this unlucky Accident happened, with certain Articles of Exculpation which were then offered in Court; the Prosecutors had been thought of this Stratagem, to conclude against them both as *socii criminis*, and by that Means to preclude either of them from the Benefit of the other's Testimony; and therefore did insist, that the Trial might be divided, and that *James Long* should first be proceeded against. And no Doubt, such is the Justice of our Law, that where it appears any undue Advantage of this Kind is aimed at, there the Judge will interpose, and by dividing the Trials, allow the Pannels the Benefit of the Testimony of those Witnesses who appear the least guilty, or altogether innocent, and are only brought into the Libel to render their Testimony ineffectual to the other Pannels. But is there the Colour of a Reason for this Objection in the present Case? Have the Officers of the Crown, who are the only Prosecutors, a Design to bereave either of the Pannels of their Lives, without allowing them a fair Trial? Are they now insisting against any but those two Fellows, who, by the Pannels own Acknowledgment, were engaged in that Scuffle with the Detundt when he received his Death? Or, (which of all other Circumstances is most material) is there here any Penury of Witnesses? Something of this Kind might with Reason have been alledged, if all those who were in the same Boat with the Pannels, when the Murder was committed, had been accused; but

When the Fact is, that of eleven People who were in the Custom-house Boat, two only are accused as guilty of the Murder, it must appear to Demonstration that nothing of this Kind is here either inviously done or intended: That the Pannels can be under no Penury of Witnesses; and therefore that there is no Reason for dividing the Trial.

The Procurators for the Pannels, denying always the Libel, did, in the next Place, by a Recital of the Fact, in a Manner altogether different from what is laid in the Libel, endeavour to exculpate themselves from the Guilt of the Murder, and in this View did alledge the true Fact to have been,
 “ That *Hugh Fraser* the Defunct, and some others,
 “ being concerned in a Cargo of Wine, then on
 “ board a Ship lying in the Firth, did intend to
 “ run the said Goods ashore, without making true
 “ Entries, or paying the King's Duty; That the
 “ Custom-house Officers in that Part being apprized
 “ of this, and fearing to meet Resistance, did apply
 “ to Lieutenant *Caufield*, Fort-major and commanding Officer in that Place, and obtained from
 “ him a Corporal and three Soldiers to go along
 “ with the Custom-house Boat, and be assisting in
 “ making the proper Seizures: That accordingly the
 “ said Party, in all about Eleven, of which Number the Pannels were two, did set out in the
 “ Custom-house Boat early in the Morning of the
 “ same Day, being the 4th of *June*, and in their
 “ Way met with the same *Hugh Fraser* the Defunct, and some others, in another Boat, to whom
 “ they made up, but were called to by him to stand
 “ off, for that if they attempted to board their
 “ Vessel, they would all be knocked in the Head;
 “ at which Time the two Boats being so near, “ the

the Pannels, and the rest of the Crew with them,
 did easily discover that the other Boat did only
 carry one Hogthead and a half, and a small Chest,
 they concluded the same to be a Decoy to lead
 them from the Scent of greater Game, and there-
 fore chose, without coming to Blows, to abandon
 that Seizure, and go in quest of others; That
 accordingly in the Afternoon of the same Day,
 they again met with the said *Hugh Fraser* in
 another Boat, having aboard to the Number of
 twelve or fourteen Persons, and coming up to the
 same, were called to by the Defunct not to come
 aboard, otherwise they would repent it; and upon
 the two Boats coming close together, *Hugh Fra-*
ser the Defunct, having at first, with his Foot
 or otherwise, endeavoured to shove off the Custom-
 house Boat, but thereafter observing the Pannels
 with their Guns and Bayonets, did immediately
 leap from his own into the Custom-house Boat,
 and seized the two Guns, endeavouring to disarm
 the Pannels, and was immediately followed by
 four others of the Crew, who all leapt into the
 Custom-house Boat, one of them having a cock'd
 Pistol, with which he struck down one of those
 in the Custom-house Boat, who had a Blunder-
 bush in his Hand, and threw the Blunderbush
 over board. By all which, as a great Confusion
 was occasioned, it might possibly be true, that in
 this Scuffle the Defunct received a Wound in his
 Breast, and soon thereafter died." And in this
 favourable View of the Matter, supposing the Fact
 to have truly happened as represented on their Part,
 it was further contended, That as the Smuggling
 Trade, and clandestine running of Goods, without
 Entry, or paying the King's Duties, is contrary to

Law; and prohibit under severe Penalties, and those concerned in it *versantes in illicito*, so it is the Duty of the Custom-house Officers, in their respective Posts, to watch against those unfair Practices, and to make the proper Discoveries and Searches tending to that End; for facilitating of which, they are by Law entitled to Admittance into any Vessel, and in case of unlawful Resistance, to force their Way *vi & armis*, even with the Hazard of the Lives of those who shall dare to oppose them. So that if the Fact comes out to be, that they demanded Access into the Vessel, and were not only refused, but violently resisted, when endeavouring to get in, it was lawful for them to force their Way, and if necessary, even to kill those by whom the Resistance was made; which Privilege, the Procurators for the Pannels were pleased to say, was not peculiar to Custom-house Officers alone, but to all other publick Officers of the Realm, who not only may, but are bound to execute the Duties of their Office at all Hazards. And in Support of this Doctrine, some Observations were made upon the many Inconveniencies and Disturbances that must necessarily arise, particularly in the Matter of the Customs, if the publick Officers of the Nation might upon every Occasion be stopt and deforced in the Execution of their Offices.

Abstracting from the foregoing general Defence, and upon Supposition of the Fact as above, a separate Defence was pled for both the Pannels, *viz.*

“ That when they, in a peaceable Manner, and in
 “ Discharge of their Duty, without any other Provocation, did demand Admittance into their
 “ Boat, in order to make Prize of the uncustomed Goods therein, they were immediately
 “ attacked

attacked by the Defunct, who leapt into the
 Custom-house Boat, seized the Guns of the two
 Pannels, and endeavoured to disarm them, and
 was immediately followed by four more, one of
 them having a cock'd Pistol in his Hand, with
 which he struck down one of the Persons in the
 Custom-house Boat; and that this being truly
 the *initium rixæ*, the Attack was first made by
 the Defunct and his Associates upon the Pannels;
 who were thereby *constituti in periculo vitæ*;
 and seeing a cock'd Pistol in one of the Invaders
 Hands, had Reason to imagine that they were
 immediately to be followed and assisted by the
 rest of their Crew, who, for any Thing known to
 them, might all have Arms. So that from the
 universal received Laws of *Self-defence*, it was
 lawful for them to repel Force by Force, and
 cannot be said to have exceeded the *moderamen*
 of *inculpata tutela*, where the Danger was so ap-
 parent, and the Consequences of their suffering
 themselves to be overpowered so uncertain."

This being the Substance of what was offered in
 behalf of the Pannels, the Prosecutors do not mean
 to insist, that the Defences offered, as founded upon
 Facts inconsistent with the Libel, ought therefore to
 be *simpliciter* repelled, and the Libel only admitted
 to Proof. They believe it to be the Practice, and just-
 ly so, in criminal as well as in civil Cases, that
 where the Allegations of Parties are contradictory,
 a conjunct Proof will be allowed; or, which in Ef-
 fect is the same Thing, a separate Relevancy will
 be determined both as to the Libel and the Defence,
 and both admitted to Proof: By which Concession
 in Point of Law, the Prosecutors would not have
 it understood, as if they did in the smallest Degree
 depart from the Fact as set forth in the Libel, or
 admit

admit of any one Particular as alleged inconsistent therewith, to be either true or relevant; they have Reason to believe the Proof will be full in every Article, particularly, that in the Morning of the said Day, when the first Boat, in which the Defunct was with several others, was met by the Pannels and others in the Custom house Boat, it is so little true, that either the Defunct, or any other of his Company, used these threatening Expressions, that on the contrary, they submitted voluntarily to the Seizure, and actually received into their Boat *John Robertson*, one of the Custom-house Officers; and just so in the Afternoon of the said Day, upon the second Recounter, on the first Approach of the Custom-house Boat, the Pannels having their Bayonets screwed on, their Guns cock'd and levelled against the Defunct and those in the Boat with him, the Defunct called aloud, *to use no Violence, and not to fire, for that he and the Crew were in their Will*, so little was there any previous Provocation or Cause given for the barbarous Murder after committed. But as these Facts are already sufficiently set forth in in the Libel, and as is believed will come out upon the Proof with several aggravating Circumstances, it seems unnecessary to enlarge further upon them at present, so that it remains only to examine the Relevancy of the two general exculpatory Defences pled for the Pannels.

And in Answer to the *first* of these, *viz.* “ That they being in their Duty, as having received Orders from the commanding Officer in the Place, to assist the Custom-house Officers, and as such entituled to Admittance into the Boat, “ it was unlawful in the Defunct to refuse the same, and consequently lawful for them to force

their Way, and in case of Resistance even to kill." It the Prosecutors are rightly informed, will come out upon the Proof, that they had no proper Orders, if any at all, and therefore were by no Means there upon Duty, but as private Adventurers went along in hopes of a Share of the Booty; for as to the alledged Order from Lieutenant *Canfield*, though true, it could not possibly avail; he is no Officer in that Regiment, and as for Major, has no sort of Command over the Military, and therefore could give no such Orders: But admitting this pretended Order from a proper commanding Officer, were they authorized, or could any Officer give them Orders to begin an Attack upon the very first Approach, without knowing whether they were to be opposed or not, or, which is truly the Case, after an explicate Declaration to the contrary? They were there at most but as Assistants to the Custom-house Officers, and therefore ought to have waited their Orders, to make any Seizure, or to begin any Violence: In stead of which, no sooner did the two Boats come in View of one another, but these Pannels put themselves in a Posture, and made ready for the Attack, though earnestly required by the Waiters and Custom-house Boatmen not to be rash; and though there is all imaginable Reason to believe that the Fact will come out so upon the Proof; yet admitting it to be otherwise, the Prosecutors cannot persuade themselves that there is the least Relevancy in the Defence, which, as laid, is absolutely inconsistent with the common Principles of Law, the universal Practice in this and other parallel Cases, and, if authorized, would be attended with the most dangerous Consequences to the Peace, Lives, and Liberty of the

the-Subje&t. The Rule of Law is directly otherwise. That no Officer of the Law, tho' illegally deposed in the Execution of his Office, is thereupon entitled to proceed to such Extremities, unless where the Law is special to that Purpose; of which we have some Instances in our Statute Books, particularly in the A&t of King *James VI.* anent *Master's Reifs and Depredations*; there the Law thought proper, in Odium of so notorious a Crime, to constitute the whole Leiges the publick Executioners of the Law, and to authorize the Nation in general at their own Hand, to take Vengeance of the Crime, indemnifying them at the same Time from all the Consequences: And as a particular Law was necessary in this Case, it shows the Genius of the Law in general to be, that in no Case is any Person, whether in a publick or a private Capacity, allowed to be Judge for himself, and much less, on that Account, to embrew his Hands in his Neighbour's Blood; the Cognizance of all such Matters are wisely reserv'd to the Judges of the Land, the Lieges are entituled to a fair Trial, and not to be knocked in the Head by every little Custom-house Officer, Messenger, or their Assistants under Pretext that they oppose them in the Execution of their Office. Where that happens to be the Case, the Law is patent: But an Indulgence of this kind is of that Nature, as would necessarily expose the Lives of the Lieges to the Caprice of every petty Officer of the Law, whose Judgment or Integrity is seldom proper to be entrusted in a Matter of much less Consequence.

In a particular Manner this appears to be the Disposition of Law in Matters of Seizures, which, as it provides anxiously against, and endeavours by all

prudent Measures to prevent the pernicious Practice
 of Smuggling, by imposing severe Penalties upon all
 such as are any ways concerned in the clandestine
 Running of Goods, upon Masters of Ships, who suf-
 fer the said Goods to be carried out of the Ships
 without regular Entries, and by Confiscation of the
 Goods themselves, so it would appear that the Legis-
 lature considered these as sufficient to deter any Per-
 son from adventuring on the like Practices, though
 new Laws can be made so severe, that some People
 will not dare to break over; but where that happens,
 as the Law said, that in such Cases, particularly in
 this of Seizures, that the Custom-house Officers,
 who are entitled to make these Seizures, shall have
 Liberty to put to Death all such as join in the Op-
 position? No Law surely has said any such Thing,
 and to be sure never intended it. In such Case, it
 is the Duty of Custom-house Officers, if refused Ac-
 cess, to plant Guards, so as to secure the Goods
 from being embezzled, or to call for such Assistance
 as may be sufficient to make the Seizure; and in all
 Events there lies an Action at common Law for the
 Penalties enacted, and the Value of the Goods; but
 that they are at Liberty to force the Seizure, at the
 Expence of the Lives of whatever Number of his
 Majesty's Lieges they please, is no ways warranted
 from the Words, *Intendment, or Reason of any Law*,
 and is directly contrary to the Analogy of Law in
 other Cases of the very same Kind. Thus, by the
 famous Statute, 12th of K. Charles II. it is specially
 provided, *That if any Goods are landed, for which*
Duties are payable, without Entry thereof, Application
on must be made by the Customer or Collector to the
chief Magistrate of the Place, showing where the
Goods are, which Magistrate is thereby empowered to
issue

issue Warrant to any Person, with the Assistance of a Constable, or other Officer, to enter the Houses where such Goods are suspected to be concealed, and, in case of Resistance, to break them open. And in like Manner, by the Statute, *decimo Georgii primi, cap. 5. in relation to the Duties granted upon Coffee, Tea, &c.* where the Officer for the said Duties suspects that any of the foresaid Commodities are fraudulently concealed, and is desirous to search the suspected Houses, the Law directs that Application must be made to a Justice of Peace, or other Magistrate, who, upon Cognizance of the Grounds of Suspicion, are empowered to grant Warrant to enter such Houses, and a special Penalty is enacted against such as shall obstruct, or hinder any of the said Officers from so entering. Many other Laws to the same Purpose, in Relation to particular Duties, might be observed, particularly the *Act octavo Georgii primi*, intituled, *anent the clandestine Running of Goods, &c.* and *sexto Georgii*, intituled, *for preventing of Frauds and Abuses in publick Revenues of Excise, Custom, &c.* and all the Statutes in relation to the Duty upon Salt. By all which, after prescribing the Rules how these Searches and Seizures are to be made, in case of Resistance, special Penalties are enacted against such as shall violently obstruct the Execution; and no Instance can be given, where, by any Statute in relation to any Seizure or Search for uncultivated Goods, either at Sea or Land, the Officers for these Duties are empowered by their own Authority to use Violence, be the Consequence what will, and to force Admittance.

And so this Matter was solemnly adjudged in two parallel Cases by the Court of Justiciary; the first in the Year 1672, where *Mr. Archibald Beath*

was indicted for the Murder of *Allan Gairdner*, the
 case of which was in most Respects parallel to the
 present: *Mr. Beath* was concerned in a Seizure of
 Meal brought from *Ireland*, which was not only abso-
 lutely prohibite, but the Vessel ordained to be sunk;
Allan Gairdner opposed the Seizure, made off with the
 Meal, and attempted to run down the other Boat;
 upon which some Guns were discharged, and *Allan*
Gairdner killed. The Defence they pled was the
 same as now offered for the Pannels, *That they were*
indited to make the Seizure, and were opposed in
it, which justified the Murder that followed: Not-
 withstanding of which he was put to the Know-
 ledge of an Inquest, and being found guilty, was
 condemned to lose his Head. And in like Manner,
 in *February* 1674, some Soldiers, who were ordered
 by their Officers to be assistant to a Messenger in an
 Execution of Pointing, in which they were defor-
 ced, having killed a Man; they were thereupon cri-
 minally pursued, and found guilty. And surely
 there is nothing peculiar to Seizures at Sea of this
 Kind, which ought to distinguish them from com-
 mon Cases. A Waiter at the Port of this Town,
 who collects the petty Dues, and gathers the Town's
 Impost, is as much entitled to levy these, to search
 for and stop uncustomed Goods, as any Custom-
 house Officer is to make Seizures of, or search for
 counterband Goods at Sea; and yet surely it would
 be ludicrous to pretend, that if any Person should
 endeavour to force his Way into the Town without
 Payment, or otherwise to obstruct these Waiters in
 collecting these Dues, that they, as in Execution of
 their Duty, would be impowered to use Violence,
 and could not be charged with the Consequences,
 though never so bad. All Opposition of this Kind

to any Officer of the Law, though in their Duty is at most but a Deforcement, which may subject the guilty Persons to the special Penalties enacted by Law against such as are guilty of that Crime; but never could be the Intendment of the Law, upon that Account, to make Murder lawful, or to justify the Committers of it; that would be, in other Words, to make Death the Punishment of Deforcement: And therefore, to conclude upon this Point as the Defence here offered is founded upon Supposition of certain Facts inconsistent with the Libel, and the contrary of which will be proven; so admitting these to be true, the same is absolutely irrelevant.

As to the other exculpatory Defence, likewise offered in behalf of both the Pannels, "That they being first attacked by the Defunct, who leaped in to the Custom-house Boat before any Violence was offered, catching hold of the Pannels Guns and endeavouring to disarm them, and was followed by other four, one of them having a cocked Pistol in his Hand, with which he knocked down one of those in the Custom-house Boat; it was lawful for them, as being thereby *constituti in periculo*, and having Reason to apprehend the worst, to stand to their own Defence, and to repel the Force, though with the Death of one or all of the Aggressors."

As by the Proof upon this Point it will come out that there were no less than eleven Hands in the Custom-house Boat, five of these armed with Guns and three screw Bayonets, it is highly unteasible that the Defunct by himself, and without Arms should leap into a Boat full of armed Men, with an Intention to master the Boat and disarm the Crew; no Man living will believe that could possibly be his

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Intention: And it is almost equally improbable; that other four, only one of them said to have had a Pistol in his Hand, would have joined in so impracticable an Attempt, and in a Manner to have rush'd upon immediate Death; whereas on the other hand, the Account of the Matter as set forth in the criminal Libel, is plain and natural; The Defunct had evaded the Thrusts made by the Pannels with their Guns and screw'd Bayonets, and catching hold of the Guns, which he was unwilling to let go, was in the Struggle, or by the Motion of the Boats, which were then clos together, pulled out of the one into the other, and immediately received his mortal Wound: Then it was, that some in the Custom-house Boat, who disapproved of the Violence, and had cautioned the Pannels against it, called out to those in the other Boat, praying them for God's sake to come in and endeavour to make Peace; when, and no sooner, two or three at most stepped into the Custom-house Boat; but as before that the Defunct had received his Wound, and was immediately thrown overboard, so they returned into their own Boat without offering any Violence, other than a small Scuffle betwixt *Mackinnan*, who was in Company with the Defunct, and had gone into the Custom-house Boat, and *Townson* and *Thomas Smith*, two of the Crew belonging to the Custom-house Boat, one of which, viz. *Townson*, had a cock'd Blunderbush in his Hand, and *Smith* a Gun then likewise cock'd and levell'd at the Defunct ready to shoot, but was prevented from doing the intended Mischief, by *Mackinnan's* knocking the Gun out of his Hand. But as the Defence here offered for the Pannels is founded upon Supposition, that the Fray happened

happened in the way and manner represented by them, it remains to be examined, how far even that Supposition will justify the Murder which ensued; and it resolves in this, admitting the Assault to have been first made by the Defunct, in which he was afterwards assisted by four more, none of them armed, excepting one who is said to have had a Pistol; "whether in repelling that Force, the Pannels did observe the *moderamen inculpatae tutelæ*." 24

It is a Rule of Law universally received and established by the Authority of all the Doctors, That no Provocation, however outrageous, no Assault upon the Person, or Attack even upon the Life of any Person, will justify the Person so invaded in bereaving the other of his Life, unless in the Case of absolute Necessity; that is, unless he was thereby so *constitutus in periculo vitæ*, that no way remained to preserve his own Life, but by destroying his Adversary: And therefore the *Roman Law*, as the Laws of most Countries, particularly of the neighbouring Nation and our own Municipal Law, do require this inevitable Necessity as an absolute Condition, without which it is not lawful for any Person, however unjustly invaded, to bereave the Aggressor of his Life, inasmuch that whoever exceeds that *moderamen* is deem'd guilty of actual Murder, and liable to the *pœna ordinaria*.

The Lawyers in treating upon this Point, particularly Sir *George Mackenzie*, after establishing the Rule with the Exception of *Self-defence*, which is term'd *bomicidium necessarium*, they explain the way and manner how that *moderamen* is exceeded, and the Precautions requisite to be observed, to bring it under the Description of *bomicidium necessarium*; and it resolves in this plain Proposition, that the Person

Person invaded must be reduced to inevitable Necessity, and has no Way left to escape his own Death but by killing the Aggressor: And where that *moderamen* is exceeded, and the Aggressor unnecessarily killed, it is Murder in the Eye of Law.

To illustrate this in a few Instances: If the Aggressor is unarmed, and the Person so invaded armed with mortal Weapons, so as that from an Attack of that kind he could not possibly be *constitutus in periculo vite*; if not satisfied with defending himself, he uses these Weapons to destroy the Aggressor, he so far exceeds the *moderamen*. And from the same principles, it is most justly established as a general Rule in all Cases, that wherever the Person invaded can by Flight, or otherwise, evade the Necessity of either losing his own Life, or killing the Aggressor, he is obliged to fly, and is not left at Liberty to stand upon his Defence, and to repel the Violence, by killing the Invader; and the same Rules do obtain in every other Case that possibly can happen, where the Murderer, however unjustly invaded, can any how escape the Danger, without Necessity of killing his Adversary. And surely this *moderamen* is doubly binding upon us, if our Obligation in that Particular is measured by the Rules of Christian Duty, which obliges us to suffer Injuries patiently, and to return Good for Evil. It seems unnecessary to multiply Authorities to prove the Necessity of this *moderamen inculpatæ tutelæ*, there is not one Lawyer of whatever Country or Nation who treats of that Subject, but admits it to be an established Principle, and founded in the Law both of GOD and Nature; and therefore it remains only to apply these Principles to the Case in hand, and to examine how far the Pannels were so *constituti in periculo*, as

made

made the Death of the Defunct the necessary Means of their own Preservation.

And upon this Point it seems to be admitted at all hands, that as the Defunct and those in the Boat with him were not in Quest of the Pannels, but on the contrary were endeavouring by all Means to evade a Rencounter of that Kind; so the Pannels were expressly in Quest of the other Boat, and wanted to make Seizure of the Goods in it. That being the acknowledged Fact, 'tis plain that however the Pannels might have been in their Duty at first in demanding Access into the Boat, or endeavouring to make the Seizure, yet if they found, by means of an unlawful Resistance, that Admittance could not be had, but by Force, and killing those in the other Boat, it was their Duty to have desisted and withdrawn from the Danger, as they were at full Liberty to have done, the Custom-house Boat being under Sail and afloat, and the other Boat either run aground, or lying on the Water with her Sails taken down. Great Strefs is indeed laid upon the alledged actual Invasion by the Defunct, followed by others four, and Attempt to disarm the Pannels; but when the Circumstances of that Assault, as represented by the Pannels themselves, are seriously considered, as they are false in Fact, so they will appear in no Degree relevant to justify, or even to extenuate the Murder, unless it can be thought that five Men without Arms, excepting one Pistol, who are all that are said to have boarded the Custom-house Boat were sufficient to overpower eleven or twelve Persons who were aboard the Custom-house Boat, five of them armed with charged Guns, cock'd, presented, and ready to do Execution, besides three screw'd Bayonets: In these Circumstances, it is scarce possible

sible to imagine that the Defunct, who is owned to
 have first entered into the Boat himself armless, could
 then by himself, or when seconded by other four
 having amongst them no Arms but one Pistol, con-
 ceive it practicable to master the Custom-house Boat,
 and disarm so many armed Men, prepared to receive
 them with cocked Guns and screwed Bayonets;
 and in all Events, had the Design been never so pal-
 pably intended to master and disarm the Custom-
 house Boat, yet as these in the Custom-house Boat
 were so far superior both in Number and Arms, as
 that they could easily have over-powered the
 Aggressors, without any Necessity of putting them
 to Death, it must be plain to the Apprehension of e-
 very Mortal, that the Pannels did in every Respect
 exceed the *moderamen inculpatae tutelæ*, that they
 were *constituti*, in no Hazard of any Kind, and
 therefore under no Necessity to murder that unfor-
 tunate Gentleman: And that this Pretext of Self-
 defence, under which they are now glad to shelter
 themselves from the just Vengeance of Law, is
 an after Device, to justify a most barbarous and un-
 necessary Murder, of which a stronger Instance can-
 not be given than the Inhumanity with which that
 Intention to murder was prosecuted and compleated,
 by throwing the Delinquent over Board into the Sea,
 after he had got the mortal Wound in his Breast,
 and after ail, when faintly endeavouring to save him-
 self from drowning, the Pannel *James Long* knock-
 ing him down with his Musket. If this Conduct
 of the Pannels can be construed in any Court of Jus-
 tice to have been either justifiable and necessary, or
 to have kept within the *moderamen inculpatae tutelæ*,
 it must be owned it would be hard to find any
 Case, where that *moderamen* can be exceeded.

Where Self-defence is allowed to make the *bomicidium necessarium*, it supposes unlawful Violence upon the Part of the Aggressor, that the Person invaded was thereby *constitutus in periculo vitæ*, and reduced to the inevitable Necessity either of killing or being killed: None of which Requisites occur in the present Case; no Invasion whatever was made on the Part of the Defunct, or any in Company with him; on the contrary, the Attack was made by the Pannels in a most illegal and violent Manner. But admitting the historical Relation of the Matter as set forth by the Pannels themselves, they neither were nor could be *constituti in periculo*; they could have retired, and were doubly more than sufficient to have mastered five unarmed Men, and therefore are in no Respect, whether considered as Aggressors or invaded, under the Description of *bomicidium necessarium*, but are guilty of a most barbarous Murder; by which the Land being defiled, Justice calls for publick Satisfaction, to the Terror of others to commit the like in Time coming.

To conclude, it will readily occur to the Honourable Judge, that the Point in Issue is of the utmost Consequence to the Peace and Security of the whole Lieges. Unhappy is the Case of the Subjects of this Realm, if every petty Officer or Executioner of the Law shall be left at Liberty, when, and how oft he apprehends himself unjustly opposed, in Execution of what he considers to be the Discharge of his Duty, to make himself Judge in his own Cause, and by his own Authority, or with the Assistance of a Military Power, to force Execution, and, in case of Resistance, to kill and destroy at Pleasure. What dismal Consequences might justly be expected from so dangerous a Precedent, established by Authority

Authority of our supreme Courts, is easier foreseen than prevented: But as hitherto no Instance does occur from our Records, either of Justiciary or Admiralty, where so barbarous a Murder was justified, and the Murderers allowed to escape the condign Punishment of their Crime, upon the slim Pretext, that they were opposed in going about the Duty of their Office, or were actually invaded, tho' never *constituti in periculo vite*, and in repelling of which they so far exceeded in every Particular the *moderamen inculpate tutelæ*: So it is with Assurance expected, from the known Justice of the Honourable Judge, that he will lay hold of this publick Opportunity, to quiet the Minds, and secure the Lives of the Lieges, that so Murder may not walk barefaced in our Streets, and will therefore sustain the Libel as relevant against both the Pannels, as guilty, Actors, Art and Part of the actual Murder, and repel the Defences offered.

According to Justice, &c.

ALEX. LOCKHART.

INFORMATION
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September 23. 1735.

INFORMATION for Thomas Mac-Adam Soldier in the Regiment of Foot commanded by Colonel Hamilton, and James Long Corporal in the said Regiment, Pannels;

Against his Majesty's Advocate, and Mr. Hugh Forbes Procurator-fiscal of the High Court of Admiralty, Pursuers.

THE Pannels stand accused before the Honourable Judge of the High Court of Admiralty, for the atrocious, and therefore not easily presumable, Crime of *Murder* or *Manslaughter*, and the Fact libelled against them is, "That, having conceived a deadly Malice against the deceased *Hugh Fraser* younger of *Beltnain*, they, upon the 4th of *June* 1735, with several other Persons then in Company, armed with Guns, Bayonets, Blunderbushes, and other mortal and hostile Weapons, came in an open Boat off the Shore of *Nairn*, up with another Boat wherein the Defunct was; and, so soon as their Boat came near the other Boat, they screwed their Bayonets upon their Guns, and cock'd the same, which were loaded, and kept them levelled against that Part of the Boat where the Defunct was: And, so soon as the Boat came within Reach of the other, they push'd several Times with their screwed Bayonets at the Defunct, who was unarm'd and defenceless, altho' the Defunct cried out to them before

" that

“ that Time, not to fire, for he and all with him
 “ were in their Will : But the Pannels continuing
 “ their Attacks upon the Defunct, he had no other
 “ Way to escape instant Death, than the catching
 “ hold of the Muzels of their Guns, and holding them
 “ up ; and having thus caught hold of the Guns,
 “ the Defunct stept or was pulled into the Boat
 “ where the Pannels were, but without any Wea-
 “ pons ; and the Struggle occasioned by his still endea-
 “ vouring to keep the Guns, or the Motion of the
 “ Boat, threw the Pannels with the Defunct down
 “ in the Boat ; at which Time the Pannel *Thomas*
 “ *Mac Adam* most feloniously, and with a murde-
 “ rous Design, unscrewed his Bayonet, and gave
 “ therewith the Defunct a Stab in the Breast, of
 “ which he died in a few Minutes : And that
 “ then the Pannels threw the Defunct into the Sea ;
 “ and, as he was endeavouring to regain his own
 “ Boat, *James Long* struck him with his Gun, en-
 “ deavouring to keep him from getting in.”
 “ It is separately libell’d, under an AT LEAST,
 “ That *Hugh Fraser* was then and there killed,
 “ and that both of the Pannels were Art and Part
 “ of the Murder : From all which the Pains of
 “ Law are concluded for.”

The Pannels have denied this Libel : And as they
 assuredly know that they bore no Malice to the
 Defunct, and that they had upon the unfortunate
 Occasion, which is the Subject of this Trial, no In-
 tention to kill the Defunct or any Person whatever ;
 they adhere to this their Denial, and farther say,
 That if it should be proved (as they believe it
 will not be) that any Stroke or Blow of any Kind
 was given by either of them to the Defunct, of
 which he might afterwards die : Whatever may
 be

be so proved to have been done, was done in just and lawful Self-Defence, and consequently was no Murder.

The *Species facti* upon which their Defence is founded, is as follows, That the Pannels are Soldiers in Colonel *Hamilton's* Regiment, which then lay at *Inverness*, and were called to be assisting to the Officers of the Customs in the Execution of their Duty; for which Purpose, Captain *Gaulfield*, commanding Officer at *Inverness*, gave the Pannel *James Long* a written Furlough for himself and two Men more to be absent upon that Duty six Days: That during the six Days, early in the Morning, upon the 4th of *June*, the Pannels being aboard the Custom-house Boat, they came up with another Boat, in which the Defunct was; And, the Officers having called to demand Entrance into the Boat, the Defunct and others aboard thereof threatened, that if they offered to enter, their Brains should be knock'd out: That in a little While the Boat's Crew grew softer, and agreed to go to *Inverness* with an Officer: The Reason of which probably was, That there being on Board only a Hog-head, half Hoghead and a Box, it might amuse the Officers, and keep them out of the Scent of the larger Cargo: That upon this the Boats parted; and the Custom-house Boat standing towards *Cromarty*, put in for Refreshment towards *Fortrose*, where they spy'd five or six Boats further down the Firth; and, having begun to give them Chase, they came up with the Boat they had formerly spoke with, but found that the Defunct had left her; after which they overtook the Boat where the Defunct was: That when they came within hearing Distance, those who were aboard the Boat called to them, That they

they had no Call there, and that, if they did not save them, they should repent it; Words which the Pannels, and those with them, could not fail to interpret by the Threatnings used that Morning, *That their Brains should be knock'd out.* That upon this the Pannels skrew'd their Bayonets, and cock'd their Pieces, to be in Readiness; but the Pannel *James Long* gave Orders to the other two, by no Means to fire: That so soon as they came near, the Defunct and others did what they could to flave off the Custom house Boat with the Tiller of their Boat, and with their Feet: But the Boat having in Spite of their Endeavours laid to her Side, the Defunct jumped into the Custom-house Boat, and was immediately followed by four others: That the Defunct catch'd hold of the Muzzle of *James Long's* Piece; and, being desired to let it go, he refused, saying, That they would fire; and that *James Long* assured him, they had Orders not to fire: That, notwithstanding of this, he struggled to keep his Hold; and, while this was doing, *M'Kinning* one of his Associates had knock'd *Mr. Townsend* down with the But-end of a Pistol, and had thrown into the Sea a Blunderbus which belong'd to him; and likewise disarm'd another Man, and came up with his cock'd Pistol to the Corporal's Face: That about this Time, by *M'Kinning* or some others of the rest, the Corporal was thrown to the Ground, as likewise *Thomas M'Adam* was thrown to the Ground by the Defunct; and that some how or other, in this Scuffle, the Defunct received a Wound, and died soon after. From which Facts, which the Pannels offer to prove, they apprehend that it is clear, that the Defunct and those with him had unlawfully invaded the Boat in which the Pannels were,

were, being but Two of Ten : That Five out of Eleven, from the other Boat, had already entered theirs ; and they had Reason to apprehend that all the Rest would follow ; and that those who had entered, having begun Hostilities, all these in the Boat were *constituti in periculo vitæ* : And, if they repelled Force by Force, they are blameless, whatever was the unlucky Event.

It will easily be seen by the Court, that this Scuffle was occasioned by the pernicious Trade of Smuggling ; a Sort of Commerce, which, after having debauch'd our common People, and rendered too many of them regardless of the Laws, and regardless of their Oaths before God Almighty, drain'd our Country of her Treasure, in Return for the most mischievous, as well as the least necessary Articles of Importation ; and, after a short precarious Run of a trifling Gain, generally terminated in the Destruction, of those concerned in it ; has of late Years lost to the King and the Community the Lives of many good Subjects : Such a Trade, one would think, is not to be encouraged at the Expence of the Blood of the innocent Part of the Nation ; and therefore the Pannels forbear to retaliate the injurious Expressions thrown out, arraigning the Law, which gives to the Officers of the Revenue the Trust they now enjoy. They, and those who are legally called to their Assistance, place their Confidence in this, that they are as strong as the Laws ; and they hope never to see the Time when any Man whatsoever shall be stronger : They humbly conceive, that in the Execution of their Duty, the Law is their Protection ; and that they are intitled to a legal Favour, till it shall be proved that the Bounds of their Duty were transgress'd.

Before

Before enlarging on the general Defence, *Thomas M^r Adam* Pannel offered to the Court a separate Consideration, *viz.* That he had Reason to believe that the other Pannel would be a material Witness for proving his Defence : And therefore, since by the Libel it appears that *James Long* had not the least Accession to the Homicide, the Prosecutors either should pass from him as a Pannel, otherwise he insisted that *Long* should be first separately tried. And as he is advised that this Demand is his Right, so he cannot doubt, that from the known Equity of his Judge, he shall obtain it, tho' the Court may be thereby a little longer detained ; a Thing which the Honourable Judge will think lightly of, in Comparison of the Life of a Man.

To this it was answered for the Prosecutors, “ That such Demands for dividing Trials are not granted, but where there is a Suspicion that the Pursuer has libelled against Persons with a View to deprive the Pannel of material Witnesses ; That here no such Thing is or can be suspected : The cocking the Guns, and pushing with the Bayonets, is libelled against both the Pannels ; it is likewise libelled, That *James Long* struck the Defunct with his Gun, and that the Defunct died either of a Wound or a severe Blow ; so that upon the Trial it may appear that *Long* was the real Murderer ; and further, that in this Case there is no Penury of Witnesses. But finally, As the Pursuers have libelled Art and Part against *Long*, that by itself is unexceptionably relevant, and they are not bound to open themselves further.”

But it is replied, That tho' the Pannels do not object to the Relevancy of Art and Part, yet they are sure the Pursuers have been so ingenuous as to

libel in the previous Subsumption all the Circumstances from which they have Reason to believe that Art and Part can be inferred. The Pannel *Long* does insist upon his total Innocence ; and his Denial is more favour'd in Law than the Assertion of the Pursuers Libel. If a Pannel could be deprived of this Privilege of having his material Witnesses first tried, by an Answer of the Pursuers, That the Pannels appear *by the Libel* to be intimately conjoin'd in the Crime, it will be easy for every Pursuer to frame his Libel in such a Manner as that this Privilege of the Pannel shall be inevitably eluded : It is therefore sufficient for the Pannels here to say, That as every Word of the Libel is by them denied, and as there is hitherto no other Evidence of this close Conjunction but by an Assertion in the Libel, that Assertion cannot be taken for Truth, in Prejudice of either Pannel. But the Pannel *M^cAdam* insists, That from the Circumstances of the Libel, tho' true, *Long's* Accession does not appear : He cock'd his Piece, but it is plain he did not fire, which he would have done had he had an Intention to kill ; he skrewed and push'd with his Bayonet, but it is plain, from his having done no Hurt, which he might easily have done, that he had no Intention to do any. It is libelled, That *M^cAdam*, and not he, gave the deadly Wound ; and the Libel expressly says, *That of that Wound he died* ; which cannot be contradicted by the posterior Alternative of having *possibly* died by the *Blow*. The Circumstance of *Long's* having struck the Defunct in the Sea, (the contrary of which is true ; for it will be proved, that after the Defunct fell overboard, *Long* was very instrumental in raking him up again) is libelled as posterior to the deadly Wound, and cannot even be

be considered as an Aggravation of it. Wherefore *M'Adam* insists, That if there is legal Proof against *Long*, he may be convicted separately; and if there is no legal Proof, there is no Reason why he should be deprived of a material Witness.

As to the Penury, every Crime supposes a Penury which is transacted *intra privatos parietes*; and the Case of a small Boat at Sea must necessarily suppose a Penury of that Sort; besides Want of Penury may well be objected to a Pursuer, but a Pannel is much more favour'd in his Defence. And further, there is one obvious Ground of Penury in this very Case; for the Honourable Judge will observe, That the Pleading turn'd upon this single Point, Whether the Defunct invaded the Boat, or was forced into it? The Pannels stood with their Backs to several of the Crew in their own Boat: And, as this is a Thing depending upon a critical and nice Observation, consisting in a *punctum temporis*, and not to be seen but by such Persons as were in one precise Situation, there must necessarily be a Penury. It is true, that those in the other Boat could better see this; but the Pannel is not obliged to confine the Proof of his Defence to such Persons as may be reasonably suspected of Partiality, most, if not all of them, having been Accomplices of the Defunct's Aggression. For all which Reasons, the Pannel *M'Adam* humbly insists upon his Demand, and craves the Judgment of the Court upon it.

The Pannels shall not detain the Court with expatiating upon the Relevancy of their Defence. The two Accounts of the Matter are irreconcilably different, and that given in the Libel has a manifest Air of Affectation: Malice against the Defunct, it

is hardly possible to suppose in this Case, seeing he was scarcely known to the Pannels : That the Defunct, had his Intention been to allow Access to the Officers, or barely to defend his own Boat, should think with his two Hands to avoid the Fire of two cock'd Pieces, when by the Pursuer's own showing there were two more, and a Blunderbuss in the same Boat, and that he should come into the Boat where his Assailants were, on Purpose the better to defend himself, is so improbable, that it cannot meet with Belief : Whereas, in the Account given by the Pannels, there is nothing unlikely, that the Defunct having a considerable Cargo at Stake, and seeing no Way to secure it if the Officers should once enter his Boat and no Way to hinder their Entrance but by becoming Masters of theirs, should boldly take the Resolution of disarming the other Boat, presuming, it is likely, that he would not find any effectual Resistance ; That in this Attempt he was joined by four more, and probably would have been by all the rest, if that unlucky Accident had not befallen him. Upon this Account, the Pannels conceive that their Defence ought to be sustained, and admitted to Proof, notwithstanding of the Pursuers Answers.

Before stating and replying to these Answers, the Pannels beg Leave to make two or three short Observations in Support of their Defence.

1st, That it cannot be denied that the Defunct and those with him *versabantur in illicito*, they were, as will be proved, at that Time endeavouring to run Goods; they denied Access to the Officers, which they had a Right to demand, whatever Goods might be on Board, prohibited, high-dutied, uncustom'd, suspicious or not. Not only so, but

but they unlawfully invaded the Custom-house Boat, one of them at least having a charg'd Pistol; from which the Crew might reasonably conjecture, that the rest were armed in the same Manner; and they proceeded to disarm and knock down as many as they could.

2do, That by the Statute 14th *Charles II. Cap.*

2. "Officers of his Majesty's Customs, and their Deputies, are authorized to go aboard any Ship or Vessel, to search for and seize all prohibited and uncustomed Goods, as the said Act particularly directs; and a Penalty is thereby inflicted upon every Person who shall resist, affront, abuse, beat or wound any Officers in the Execution of their Office, or such as shall act in their Aid or Assistance, either on Board any Ship or Vessel, or upon the Land or Water."

Likewise, by the 32d Section of the said Statute, it is further enacted, "That all Officers belonging to the Admiralty, Captains and Commanders of Ships, Forts, Castles, and Block-houses; as also, all Justices of the Peace, Mayors, Sheriffs, Bailiffs, Constables and Head-boroughs; and all the King's Majesty's Officers, Ministers and Subjects whatsoever whom it may concern, shall be aiding and assisting to all and every Person and Persons, which are or shall be appointed by his Majesty to manage his Customs, and the Officers of his Majesty's Customs, and their respective Deputies, in the due Execution of all and every Act and Thing in and by this Act required and enjoined: And all such who shall be aiding and assisting unto them in the due Execution thereof, shall be defended and saved harmless by Vertue of this Act."

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All which Particulars stand further confirmed by the Writs of Assistance granted to the Officers of his Majesty's Customs, and which very Writs are founded upon the above-recited Statute, and the other subsequent Acts of Parliament which are relative thereto.

3^{tho}, That where a Number of Men enter by Violence any House or Ship to disarm the Persons within or on Board, and deprive them of their Liberty, they cannot know what further Violence is intended to them; and therefore at this Attempt the Right of Self-defence begins.

The Replies made by the Pursuers seem to be in Substance as follows, “ *imo*, That the Pannels being Soldiers, had nothing to do there, not even tho’ Captain *Caulfield*’s Orders should be proved, “ because he was not their commanding Officer, “ 2^{do}, That as they were only Assistants to the Custom-house Officers, they should have waited for their Orders before they begun any Attack. “ 3^{tho}, That Officers of the Law, tho’ resisted or deforced in the Execution of their Office, are guilty of Murder, if they kill those who resist; “ and to this Purpose two Cases are quoted in the 1672 and 1674; and that where the Law would indemnify such Homicide, there are special Statutes to that Purpose, out of which Cases it is not allowable to kill. 4^{tho}. That particularly in Cases which concern the Revenue, particular Penalties are appointed in Case of Resistance, the Consequence of which Resistance is only to incur the Penalty. *Lastly*, That the Pannels transgress’d the *moderamen inculpatæ tutelæ*; in so far as this Deed was done before the Pannels were “ *constituti in periculo vitæ*, or before the Defunct “ and

and those with him were in *actu proximo occidendi*."

As to the first of these, the Honourable Judge will see from the Paragraphs of the Statute of Charles II. already quoted, That the Assistance of *all his Majesty's Subjects* is by Law to be given to the Officers of the Revenue in the Execution of their Duty; and they are advised, that even without such a Statute, where Powers are committed to any Officer, every Subject, if required, ought in Duty to assist: And, tho' he would not transgress any positive Law by withholding such Assistance, yet, if he gives his Assistance, the Thing itself speaks that he ought to be indemnified. The Execution of the Law is the Business of every Man in the Community, and no Man ought to be discouraged from lending his Help to it. This Case is the less exceptionable, because it is declared by the Statute, that all Subjects whatsoever shall be aiding and assisting to the Officers in the due Execution of their Offices, and *all such Aiders and Assistors shall be saved harmless*. If the Pannels are not to be considered as *Soldiers*, still, as *Subjects*, they have the Benefit of this Law. But,

2do, It is a Branch of the General Orders given to the Army, That they are to be assisting to the Officers of the Revenue in the Execution of their Duty when required; and it may be justly questioned, if a Soldier, not thereby incurring any military Pain, could justify himself if he refused his Assistance. Yet,

3tio, & *separatim*, The Pannels offer to prove (what they apprehend to be altogether unnecessary) for this very Purpose of assisting the Officers of Customs, That they had *six Days Furloff* from

from Captain *Caulfield* who was habite and reputed (and really was) the commanding Officer in *Inverness* at that Time. Much less than this would be sufficient; for verbal Orders, even from an Officer subordinate, would be a good Warrant in such a Case as this, especially if the commanding Officer was not in the Way; but, tho' verbal Orders would be good, written Furloffs are sometimes granted, that the Party may have them to show, in case during the Time they are questioned as Deserters; and when the Time is expired, the Furloffs are delivered up, and commonly neglected or cancell'd. In the present Case, the Furloff was given in Writing, which is offered to be proved *ex Superabundanti*. That Mr *Caulfield* was not commanding Officer, is a Mistake; he was at that Time the eldest Captain upon the Place.

But further, for *Thomas MacAdam* this Objection is noways relevant: He is a private Centinel, who was there along with his Corporal; and the Corporal being his Superior, had the same Authority as if he had been a General: So that his Case, were the Doctrine laid down to be held as Law, would be unmeasurably hard; Tried for Life, if he goes and any Thing ensues, and if he refuses to go, shot for Disobedience.

As to the *second*, The Pannels conceive, that it is not incumbent upon them to prove, that what they did was by Orders of the Custom-house Officers. In the Pleading it was said by the Pursuers, "That " Mr. *Townsend* the Officer, had cock'd his Blunderbuss," which surely was signal sufficient for the Pannels to stand in the same Manner upon their Defence. But, as they have laid their Defence singly upon the Law of Nature and Self-preservation, they

they shall make no farther Answer than this, That the Defence of their Lives was a Privilege, which they could not be obliged to suspend till the Officers of the Customs should allow them to exert it.

As to the *third*, The Right of Officers to defend themselves when resisted in the Prosecution of their Duty, it does not exactly touch the present Case, because here was not only *Resistance* but *Aggression*: But the Pannels are advised, That the Principles of Law are upon their Side, even upon that Supposition. If those who execute the Law are bound to desist whenever they are opposed, it is evident, that in a little Time the Strength of the Laws must be at an End: For, who will venture to execute the Law, if he who resists is safe, and he who executes is liable to be punished as an Aggressor? The Pannels do not say, That he who exceeds his Powers in the Execution of his Office, ought not to be severely punished. That he was intrusted by the Law, is an Aggravation of his Offence: But where the Officers of the Law are resisted, there, not the Execution of the Law, but the Resistance is the Aggression; and the Opposition to that Aggression is just Self-defence. A Messenger having a Prisoner, is deforced: The Deforcers are liable to pay the Debt, and a Fine besides; this he knows, but he likewise knows, that it is his Privilege to keep his Prisoner if he can: He is invaded by deadly Weapons, and in his own Defence he kills. The Pannels humbly conceive, That by all Laws, by those of GOD, of Nature, of Nations, and of all other governed Kingdoms, such a Man would be held innocent; and, as they are advised, that to assert the contrary, is to dispute Principles, they shall not trouble the Court with enlarging upon it.

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The two Cases quoted concern an undue Execution of the Law: In the one Case, that of *Beath*, the Boat was flying; and the Officers could as little shoot at a flying Boat, as they could fire at a Man under Caption flying away. 2^{do}, The Defence offered for the Pannels was, That they were in Execution of the Law, in Consequence of a Proclamation from the Privy Council, authorising the Lieges to hinder the Unloading of *Irisb* Meal: And the Reply made was, That they were not within the Proclamation; tho' a better Reply would have been, That the Proclamation was illegal, because the Proclamation only authorises the hindering of the Importation of *Irisb* Meal, and laying it on Land; which was not the Case in hand, the Boat not endeavouring to make Land: And upon this, and other Replies less material, the Defences were repelled. Indeed it appears, that this Murder was in all its Circumstances a very atrocious one, and had not the least Colour of Self-defence, which is solely the Question here.

As to the other Case of the Soldiers, that was also a most barbarous Murder: Their only Defence was, That, by Order of their Lieutenant, they had gone to pounce the Lady *Frazer's* Lands, for not sending out her Militia, and that they were resisted by the Defunct. The Answer was evident, That the Order of their Lieutenant was against Law, because, by the Statute, the Warrant of two Commissioners of Supply, not being Officers, was required for such a Pouncing; and no such Warrant was sought. No Wonder therefore that their Defences were repelled upon so evident a Reply.

The Sum of what is here said amounts to this, That as Entrance into the Smuggling Boat was by Law due to the Officers who demanded it in Virtue of an express Statute, they could make good that

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Entrance as legally as any Man could break open the Door of his own House; and whoever opposed him therein, was guilty of an unlawful Act, which resolves in Aggression; and they might pursue their Duty, by repelling that Aggression by Force: But this, as has been and will be said, was not the Case.

As to the 4th Particular, "That, because of special Penalties, enacted by several Statutes, Officers are obliged to abandon their Seizures, and leave the Offenders to the Law." The present Case is widely different: For, were that the Case, where Goods are seized, they could not be condemned in Exchequer if there was Resistance, because to Resistance a certain Penalty is annex'd; and, that being satisfied, the Goods cannot be forfeited: Whereas indeed, and in Law, the very Attempt to hinder a Seizure subjects to a Penalty, and the Goods may be seized notwithstanding; for, at this Rate, Carriages of many thousand Pounds might be smuggled at the Expence only of two or three small Penalties: But the Answer made by the Pannels to this Branch is, That neither these, nor any other Statutes, repeal the general antecedent Law of Self-preservation; and it cannot be presumed by Implication, that any Thing was intended so repugnant to Nature.

As to the last Reply, *That the Pannels transgressing the Moderamen, &c.* They might beg that every Man might make the Case his own. No Man's Life is at his own Disposal; he neither can take it away himself, nor can part with it to an unlawful Invader without a Sin. The Slaughter of another Man is not more criminal in the Sight of God, than causelessly abandoning our own Life; so that Self-defence is something

Something more than a Privilege. In the present Case, Five Men of Eleven attack'd Ten, being in Probability soon to be followed by the other Six: This past at Sea, where none of the Ten could fly, but by jumping overboard: It proceeded so far, that one Man was knocked down, he and several others disarmed and secured, and a Pistol at the Breast of one more; during this *Rixa*, one of the Invaders was killed.

It is conceived, that, in such a Case, every one of the Assailants is the Enemy of every one of the Assail'd; Boat to Boat is to be reckoned as one Man to one Man. Those invaded neither could nor were bound to know the precise Strength of the Assailants; they were permitted to fear and presume the worst from what they saw: One had a Pistol, so might the rest have had, or other more dangerous Weapons; their Fears could not be said to be unjust, and the Invaders were answerable for them.

It is with Submission frivolous to pretend, "That Ten Men, Five of them arm'd, ought not to have been afraid of Ten unarm'd and One arm'd Man." (tho' in Fact all who came on board had at least strong Cudgels:) For the Superiority of the Ten over the Eleven consisted in being arm'd; and, if it were to be laid down as a Rule that their Arms were not to be used, it is plain that by that Supposition their Superiority was lost, and the others became the Masters.

The same Answer may serve as to another Part of this Reply, "That the Pannels were not *in periculo vitæ constituti*." In such a Case, the Danger of any Man was the Danger of every Man. Long, one of the Pannels, had a cock'd Pistol held to his Breast; *M Adam*, the other, was thrown down to the Bot-

tom of the Boat; So far as to their particular Danger: But they were involv'd in the general Danger of having their Boat overpower'd, and themselves disarm'd, and at the Mercy of the Invaders. Those who deprived them of Liberty, might deprive them of Life; and from the known Spite of the Smuglers against the King's Officers and such who assist them, and the frequent late Examples of Murders of this Sort committed, it was no irrational Fear.

But, shall a Man, whose House is invaded, forbear to defend his Possession, because he is not altogether sure that the Invader will kill him? Surely such a Doctrine is not to be defended. In a Ship, or in a House, whether the Attack is made in the Day-time or in the Night-time, if it is made with Force, it may be repelled with Force; and the Invader is answerable for the Consequence, both in Law and Conscience.

Wherefore, the Pannels shall not give any further Answer to the other Branch, That the Defunct was not in *actu proximo occidendi*. The contrary is evident, if the Defence is true, both as to their particular Cases, and as to the general Case of all in the Boat: Neither shall they labour to answer that Suggestion, That seeing the Custom-house Boat might have shun'd the other Boat, they were the Aggressors by demanding Access. The shortest Answer is best, That no Man can be an Aggressor who acts according to Law.

Upon the whole, this Point is indeed of the greatest Consequence. The Question really is, Which is of the highest Importance, the Life of a Man, or the Subsistence of the Laws? Whether, under the seeming Protection of the Law, the Law must be render'd useless; and whether the meanest, or let it be the greatest

greatest of the King's Subjects, can set himself in Opposition to Law, and be held guiltless? Unhappy were the Case of this Realm, if every Man, in Prosecution of a destructive Trade, shall be left at Liberty, whensoever he pleases, to oppose himself to the Execution of the Law, and, with a lawless unthinking Gang, to make himself a Judge in his own Cause, to bereave those assisting to the Law of their Liberties, and put them in Danger of their Lives; and more unhappy still would be the Condition of such, as either thro' Conscience, or by positive Command, give their Assistance to the Law, if every Transgressor should be allowed to invade them, and their Hands should be ty'd up from defending themselves. Wherefore it is hoped, from the known Justice of the Honourable Judge, that he will lay hold of this publick Opportunity, to quiet the Minds, and secure the Lives of the Lieges, that they may not lie open to every lawless Invader; and that they may know, and rejoice in their Privilege of repelling Force by Force: And that the Honourable Judge will therefore sustain the Defence pleaded for the Pannels, *viz.* " That they being aboard of the " Custom-house Boat, in Order to give their Assistance to the Officers of the Customs in the Execution of their Duty, the Boat was forcibly invaded and entered into by the Defunct and his Accomplices, and all or some of the Persons therein violently attack'd; and that in the said Scuffle, the " Slaughter mentioned in the Libel ensued, " Re-
" levant to assilzie the Pannels.

In Respect whereof. &c.

HUGH DALRYMPLE.

Curia Jusficiaria Supremæ Curie Admiralitatis, tenet in Prætorio Burgi de Edinburgo, vicesimo quinto die mensis Septembris, MDCCLXXV. per honorabilem virum Jacobum Graham de Airth, Judicem dicte curie.

Curia legitime affirmata.

Intrant Thomas MacAdam Soldier in the Regiment of Foot commanded by Colonel Hamilton, at present Prisoner in the Tolbooth of Edinburgh, James Long Corporal in the said Regiment, both of them indicted and accused at the Instance of Duncan Forbes, Esq; his Majesty's Advocate, and Mr. Hugh Forbes Advocate Procurator-Fiscal of the High Court of Admiralty, for the Crime of Murder, in Manner mentioned in the Criminal Letters against them thereanent, before insert, in the Court holden the 17th Day of September Instant.

Pursuers, Mr. Hugh Forbes	}	Procurator in Defence,
Advocate, Procurator-Fiscal.		
Mr. Alexander Lockhart		
Advocate.	}	Mr. Hugh Dalrymple.

The Libel and Information for both Parties being read in Presence of the Judge, and in Presence of the Pannels and Affizers:

The Judge of the High Court of Admiralty, having considered the Criminal Libel, at the Instance of his Majesty's Advocate and the Procurator-Fiscal of Court, against *Thomas MacAdam* and *James Long*, and the Informations given in for the Pursuers, and for the Pannels, " Finds the Libel, " bel,

"bel, that the Pannels or either of them, did kill
 "Hugb Fraser of Belnain younger, or that they
 "or either of them were Art and Part of killing the
 "said Hugb Fraser, relevant to infer the Pains of
 "Death and Confiscation of Moveables, and sustains
 "the Defence of Self-Defence proponed by the Pannels,
 "that the killing of the said Hugb Fraser by
 "the Pannels, or either of them, was in the necessary
 "Defence of their Lives, and repels the whole
 "other Defences proponed for the Pannels; and admits
 "them, and either of them, with the Libel and
 "Defence, and the several Qualifications and Circumstances
 "of the Defence, and the Facts alleged
 "on by the Pursuers for eliding thereof, to the
 "Knowledge of an Assize."

JAMES GRAHAM.

'Adjourns the Court till To-morrow at Nine a
 Clock, and ordains the Assizers and Witnesses to attend
 at that Time, under the Penalty of One hundred
 Merks each, and the Pannels to be carried back
 to Prison.

JAMES GRAHAM.

*Curia Jusficiaria Supremæ Curie Admiraltatis, ten-
 ta in Pretorio Burgi de Edinburgo, vigesimo sexto
 to die mensis Septembris, MDCCXXV. per honorabilem
 virum Jacobum Graham de Airth, Judicem dictæ Curie.*

Intraunt Thomas M'Adam and James Long, Pannels,
 indicted for Murder as aforesaid.

Procurators

Procurators for the Pursuers,

Mr. *Hugh Forbes*,
Mr. *Alex. Lockhart*.

In Defence,

Mr. *Hugh Dalrymple*.

A S S I Z E.

John Coutts Merchant in *Edinburgh*,
Walter Davidson Sadler there,
Alexander Symmers Bookseller there,
Andrew Gray Wigmaker there,
Patrick Gordon Watchmaker there,
Captain David Daes Shipmaster,
James Hamilton Wigmaker in *Edinburgh*,
James Steuart Merchant there,
James Tait Goldsmith there,
Thomas Craig Tobaccoist there,
Mark Sandilands Merchant there,
Walter Muschet Vintner there,
John Hay Wigmaker there,
Alexander Kincaid Bookseller there,
William Wight Baxter there.

The above Affize lawfully sworn, and no Objection made.

The Pursuer for proving his Libel, adduced the following Witneses, viz.

Compeared JOHN MACKDONALD Messenger in *Inverness*, aged Twenty five Years or thereby, married, who being solemnly sworn, purged of partial Council, examined and interrogate, Depones, That on *Tuesday* the 3d of *June* last, he was sent for by one *Andrew Monro* Merchant in *Inverness*,
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verness, who told him, he had a Caption to be put in Execution, against a Man who was at *Cromarty*, and that if he would go to a Boat which was lying at a little Distance from *Inverness*, he would be therein carried to *Cromarty*: That the Deponent with two Assistants, *MacKinnou* and *MacRae*, each of them armed with Swords, and *MackKinnen* having a Pistol upon his Side, went towards the Boat, in which they found *Hugh Fraser* (deceast) and *Duncan Grant*: That they sailed from thence to *Cromarty*, and *Hugh Fraser* having gone a-shore, and discouraged with some Men unknown to the Deponent, returned and told the Deponent, that the Bird was flown, but that he would follow him if it was to *Caitbness*, and thereupon desired of the Deponent, that he with his Assistants would go with the Boat in which he was down the Firth, in quest of *James Fraser*, and deliver a Letter-addressed to the said *James Fraser*, who would instruct him what he was to do, for that he, *Hugh Fraser*, designed to follow the Man, against whom the Caption was, to *Caitbness*: That the Deponent accordingly went with his Assistants, and having met with *James Fraser*, the said *James* told the Deponent, he had no Business with him; so that the Deponent and his two Assistants resolved to go Home to *Inverness* by Sea in the same Boat, and accordingly having pursued their Voyage to *Inverness*, they were called upon by *Hugh Fraser* the deceast from another Boat, a-board of which the Deponent came, and they sailed together toward the Coast of *Nairn*, when they discovered another Boat coming towards them, which they found to be the King's Boat: That a-board of the King's Boat there were seven Men, besides three Soldiers, in all Ten, whereof *Thomas M'Adam* and *James Long Pannels*

were two : That so soon as *Hugh Fraser* discovered the King's Boat coming towards them, he called for the Sword the Deponent had along with him, and the other two Swords, and desired them to be laid aside in the Boat betwixt two Hogheads: That aboard of the Boat in which the Deponent with *Fraser* was, there were in all Thirteen Men: That when the two Boats joined, the Pannels had their Muskets with screwed Bayonets upon them, levelled towards the Place of the Boat where *Hugh Fraser* was: That *Hugh Fraser* called out to the Soldiers not to fire, for that he and the others in the Boat with him were at their Will : That nevertheless the Soldiers did threaten to fire; whereupon *Hugh Fraser*, who was on the Side of the Boat, gripped the Muzzles of the Muskets which were in the Hands of *MacAdam* and *Long*, and struggling to have the Pieces out of their Hands, and the said *MacAdam* and *Long* on the other hand endeavouring to have their Pieces disengaged from *Mr. Fraser's* Gripes, *Mr. Fraser* was pulled into the King's Boat, and a Swell of the Sea having raised the King's Boat, these three, *Hugh Fraser*, *MacAdam* and *Long*, were thrown into the Bottom of the Boat, and *Fraser* happened to fall above *Long* the Corporal, and *MacAdam* by the Side of *Long* : That whilst they lay in this Posture, the Corporal *Long* called to *M^cAdam*, Why don't you stick or stab the Man above me; and thereupon *M^cAdam* unscrewed his Bayonet from the Muzzle of his Piece, and thrust it into *Hugh Fraser* his Breast. And being interrogate for the Pursuers, he depones, That before *Hugh Fraser* did grip the Muzzles of the Muskets, the Pannels *Long* and *M^cAdam* did push with their Bayonets at *Fraser*; and the Deponent did not hear any of those who were aboard the

King's Boat desire Admittance into the Boat where Mr. *Frazer* and the Deponent were. *Depones*, That immediately after Mr. *Frazer* had received the Wound, he got up from the Place he was lying in the Bottom of the Boat above Corporal *Long*, and *Long* having likewise arisen, he push'd Mr. *Frazer* into the Sea over the Boat-side, and as he was falling into the Sea, *Long* struck at him with his Musket, with such Violence that the Ram-rod and Part of the Stock of the Musket was broke; but the Deponent did not see, that the Blow aimed at the said *Hugh Frazer* did hit him, nor doth he, the Deponent know, whether the Ram-rod and Stock of the Musket was broke by a Stroke upon the said *Hugh Frazer*, or upon the Side of the Boat. *Depones*, That when the three Persons above named, were lying in the Bottom of the Boat, no other Person from the Boat, in which the Deponent was, save the said *Hugh Frazer*, had gone aboard of the King's Boat; but that after the said *Hugh Frazer* was in the Sea, there went aboard of the King's Boat, the Deponent and his two Assistants *MacRae* and *MacKinnon* (who had his Pistol by his Side) and no other, so far as the Deponent observed; but this Pistol was broke in the Lock, and was not charged: That *MacKinnon* went up towards one Mr. *Townsend* a Landwaiter, who had a Blunderbush in his Hand, which *MacKinnon* gripped by the Lock, and while he and *Townsend* were struggling, *Alexander Wright* one of the King's Boatmen came up to him, and endeavoured to take his Pistol from off *MacKinnon's* Side, whereupon *MacKinnon* gripped the Pistol, then in *Wright's* Hands by the Muzzle, and having wrested it out of *Wright's* Hand, he gave *Wright* a Blow with it on the Face: That

That there was one *Thomas Smith* a Boatman, who had a short Fuzee in his Hand, and he came up to the Place of the Boat where *Mr. Frazer* had been lying, and *MacKinnon*, at this Time, stepping into the King's Boat, came up and hindred him from proceeding any further; and about this Time the Deponent did observe, that *Mr. Adam*, who had given *Mr. Fraser* the Wound, had a bloody Bayonet in his Hand; that he went with it to the Side of the Boat, and washed the Bayonet in the Sea, and yet some Blood still remained in the hollow Parts of the three corner'd Bayonet: That *Hugh Fraser* (deceast) was immediately taken out of the Water, and haul'd aboard of the Boat in which he had been when the King's Boat came up with them; and having got a little white Wine out of some of the Casks that were aboard of the said Boat, he immediately died, after having got a small Quantity of the white Wine: That the Distance of Time betwixt the said *Fraser's* receiving the Wound, and the Time of his Death, was about a Quarter of an Hour: That upon the Deponent's coming aboard the King's Boat, *Walter Denoon* and *Alexander Urquhart*, two of the Boatmen aboard the King's Boat, challenged the Deponent what he had add there; to which the Deponent answered, That he was betrayed, having been sent out to execute a Caption, but which Caption the Deponent did never see, nor was he informed against whom the said Caption was directed: However, he was agreed with by *Mouro*, in Presence of the said *Hugh Fraser* and *Duncan Grant*, that he was to have a Guinea certain, suppose he stay'd out but one Night, and that if he stay'd longer, he was to have two Shillings free for each Day, besides Payment of his Servants,

vants, and defraying his Charges; and at the Time of making the Bargain, the Deponent was told by Mr. *Monro*, that either *Hugh Fraser* or *Duncan Grant* was possessed of the Caption. And further adds, That to the Deponent's Observation, there were no other Arms aboard the Boat in which the Deponent and Mr. *Frazer* were, except the three Swords and Pistol above mentioned. *Causa scientiæ patet*. And this is the Truth, as he shall answer to GOD.

JOHN MACKDONALD,
JAMES GRAHAM.

Compeared EVAN MACKINNON Shoemaker in *Inverness*, aged about Thirry five Years, married, being solemnly sworn, purged of partial Council, examined and interrogate, *Depones*, That he was called by *MacDonald* the preceeding Witness, to go alongst with him as one of his Assistants in executing a Caption against a Person in *Cromarty*; but who the Person was the Deponent knows not; nor did he hear either *MacDonald* or *Andrew Monro*, who employed him, name that Person: But *Andrew Monro* told the Deponent and *MacDonald*, that the Caption was with *Hugh Fraser* of *Bellnain*, deceased, or with *Duncan Grant*: That in the Evening of *Tuesday* the 3d of *June*, *MacDonald*, the Deponent, and *MacRae*, another Assistant, went aboard a Boat, a small Distance from *Inverness*, and in Company with the said *Hugh Fraser* and *Duncan Grant* sailed towards *Cromarty*, where when they had arrived, *Hugh Frazer* went ashore, and afterwards returned to the Boat where the Deponent was, and gave to *MacDonald* a Letter addressed to *James Frazer* Merchant in *Inverness*: That the next Day being

being *Wednesday* the 4th of *June*, *MacDonald*, the Deponent, and *MacRae*, went in another Boat in Quest of the said *James Frazer*, whom they found at Sea, and after having delivered the Letter to him, they received another Letter from him addressed to *Hugh Frazer* deceased, with Orders that they should go Home: That in their Return towards *Inverness* by Sea, they were called to by the said *Hugh Frazer* to come aboard of the Boat wherein he was, which they accordingly did; and at this Time there were Thirteen Persons aboard the said Boat, after *MacDonald*, the Deponent, and *MacRae* had gone into her: That sometime thereafter they discovered a Boat at Sea, which coming nearer them she appear'd to be the King's Boat, aboard of which (besides the Soldiers) there were other seven Persons: That Corporal *Long* and *Thomas MacAdam* Pannels, were two of the Soldiers; and the King's Boat coming nearer to the Boat in which the Deponent and the others were, *Hugh Frazer* called to them, That they should offer no Violence, for that they were willing to allow these in the Custom-house Boat to seize what Goods were aboard: That when the King's Boat was lying aside the other Boat wherein *Hugh Frazer* was, the Soldiers, who had their Muskets cock'd, and Bayonets screwed upon them, pushed at *Hugh Frazer* with the Bayonets, but did him no Harm, and *Hugh Frazer* catch'd hold of the Musket which was in the Hand of Corporal *Long*, and of the other Musket which was in the Hand of *Thomas MacAdam*, who endeavouring to disentangle and recover their Muskets, pulled *Hugh Frazer*, who was standing on the Side of his own Boat into the King's Boat, and no sooner was the said *Hugh Frazer* within the King's Boat, but *Thomas MacAdam* did stick

stick him, and having been previously ordered by *Long* the Corporal (while *Frazer* was yet in his own Boat) to stick the said *Frazer*: That the Deponent did not see the Thrust given to *Hugh Frazer* by *Mac Adam*: The only Reason why the Deponent says, that *Mac Adam* did stick him, was, That he the Deponent did observe a Bayonet all bloody in the Hands of *Mac Adam*; and that while *Mac Frazer* was standing upon the Side of his own Boat, as said is, and before he was aboard the King's Boat, the Deponent did see *Thomas Mac Adam* unscrew his Bayonet: That some short Time after *Hugh Frazer* was aboard of the King's Boat, he, and Corporal *Long*, and *Thomas Mac Adam*, fell to the Bottom of the Boat, the said *Hugh Frazer* above the Corporal and *Mac Adam*; and when they had lain in this Posture for a little while, *Frazer* got up, and then the Corporal and *Mac Adam* got up likewise, took hold of *Frazer* and threw him into the Sea, and as he was falling overboard, the Deponent saw Corporal *Long* strike the said *Hugh Frazer* with such Violence that the Ram-rod of the Gun and a Piece of the Stock were broke; and that the Stroke which the Deponent did see Corporal *Long* give to the said *Hugh Frazer*, was upon the said *Hugh Frazer's* Shoulders: That after the said *Hugh Frazer* was in the Sea, the Deponent, who at this Time was still Aboard the other Boat, did see a Bayonet bloody in the Hands of the said *Mac Adam*, and that he went therewith to the Side of the Boat, and washed it in the Sea, but still some Blood remained upon it: That the Deponent with *MacDonald* and *MacRae*, having come aboard of the King's Boat, they, with the Boat-men aboard of the King's Boat, helped to pull the said

Hugh

Hugh Fraser out of the Sea into the King's Boat; and thereafter they carried him into his own Boat, upon which he the said *Hugh Fraser* immediately died, as the Deponent believes, of the Wound which he the Deponent saw in the said *Hugh Fraser's* Breast: That no other Person came out of the King's Boat with the Deponent, except *MacDonald* the Messenger, and *MacRae* the other Assistant: That the Deponent, upon his coming aboard of the King's Boat, went up to Mr. *Townson* Land-waiter, who had a Blunderbus in his Hand, which the Deponent took hold of, and took the Priming out of the Pan of the said Blunderbus, and left it aboard the Boat, but did not throw it into the Sea, and while the Deponent was struggling with *Townson*, Corporal *Long* and some of the Boat-men dragged the Deponent by the Hair; and one *Alexander Wright* came up to the Deponent, and took the Pistol from off the Deponent's Side, which the Deponent gripped, and wrested it from the said *Wright*, and aimed a Stroke with it at Corporal *Long*, which miss'd him, but hit *Wright* upon the Cheek: That there were no other Arms aboard the Boat in which the Deponent was, save the three Swords and Pistol above mentioned. And the Deponent did not at any Time hear Admittance demanded into the Boat in which the Deponent was by the Officers of the Customs, or others aboard the King's Boat. *Causa scientie patet*. And this is the Truth as he shall answer to GOD; and declares he cannot write.

JAMES GRAHAM.

Compeared

Compeared WILLIAM FRASER Fisher and Boatman, in *Tarbet*, married, aged forty five Years, who being solemnly sworn, examined, purged of partial Council and interrogats, depones, That upon *Wednesday*, being the fourth of *June* last, about one a-Clock in the Afternoon, the Deponent, who is Master of a Fisher-boat, had aboard the same with him six other Boat-men, *Hugh Fraser* of *Belnam* (deceased) *Duncan Grant* Merchant in *Inverness* and *John Fraser*; That *Macdonald* the Messenger and *Mackinnon* and *Macrae* his two Assistants, came up to the Boat in which the Deponent and the others were; and the said *Hugh Fraser* having signified to the Deponent, and others aboard, that he was under some Apprehension, that the Officers of the Customs might come up with them, (though at that Time they did not see the Custom-house Boat) did desire the said *MacDonald* and his two Assistants, to come aboard of their Boat, which accordingly they did, and dismissed the Boat they had been in: That sometime after they discovered the Custom-house Boat coming up towards them, and then the said *Hugh Fraser* desired the Messenger and his Assistants to hide their Arms, and the rest of the Crew that they should do no Harm to the Custom-house Officers, in case they should come up with them: That the King's Boat accordingly came up with them as the Pursuer's Boat was touching Ground, and Mr. *Fraser* called out to these aboard of her, that they should not fire, because they were in their Will; but the Deponent hath since been informed, that these in the Custom-house Boat did not hear the Call: That the Soldiers who were aboard of the Custom-house Boat had their Muskets lying upon the Boat side, and the Deponent did not see any Violence

Violence offered by the said Soldiers, either by pushing with their Bayonets, which were screwed on the Muzzles of their Guns, or by cocking and presenting their Firelocks, to any that were aboard of the Deponent's Boat: That so soon as the King's Boat came up along Side of the other, the Soldiers who were then sitting got to their Feet, and put the Butts of their Muskets to the Bottom of the Boat, and rested on their Arms; and the said *Hugh Fraser* standing with one Foot on the Side of the Deponent's Boat, and with the other on the King's Boat, gripped the Muzzle of the Musket which was in Corporal *Long's* Hand, and the other Musket which was in the Hand of *Thomas Mac Adam*, Pannels, who, struggling to disengage their Muskets, pulled the said *Hugh Fraser* into the King's Boat, and at the same Time by a Surge or Swell of the Sea, the said *Hugh Fraser*, *Long* and *Mac Adam*, fell to the Bottom of the King's Boat; that in the Struggle the Corporal ordered *Mac Adam* to stick *Fraser*, but the Deponent did not see *Mac Adam* give any Thrust at the said *Hugh Fraser*: That by the Fall of the said three Persons, the said *Hugh Fraser* appeared to be uppermost, and all three having got to their Feet, Corporal *Long* and *Mac Adam* Pannels, gripped the said *Hugh Fraser*, and bowed him overboard into the Sea; but before this the Corporal struck the said *Hugh Fraser* several Times towards the left Breast; but the Deponent knows not whether his Bayonet was screwed on his Musket when he gave these Strokes, or not: *Depones* That before these Strokes were given by the Corporal to the said *Hugh Fraser*, and immediately after the said *Hugh Fraser* had got up from above the two Pannels, the Deponent did observe the Breast of his

Coat all bloody; and at this Time there was no other Person had gone from the Deponent's Boat: board the King's Boat but the said *Hugh Fraser*. That while the said Corporal *Long* and *MacAdam* were throwing the said *Hugh Fraser* into the Sea he, the Deponent, heard a Man from the King's Boat calling to those in the Deponent's Boat, to come aboard the King's Boat, to make Peace for GOD's Sake: That upon this Call *Duncan Grant* went aboard the King's Boat, but *MacDonald*, *MacKinnon* and *MacRae*, his Assistants, were aboard the King's Boat before the Call: That it was the Deponent who hauled *Hugh Fraser* out of the Sea into his own Boat; and that the said *Hugh Fraser* was not taken aboard the King's Boat after he was thrown into the Sea; nor did he see any other Person assisting to take *Hugh Fraser* out of the Sea, but *John Fraser*, who is now dead: That a few Minutes after the said *Hugh Fraser* was brought aboard the Deponent's Boat, he expired, and the Deponent having open'd his Cloaths, he saw a Wound on the said *Hugh Fraser's* Breast; and that before the said *Hugh Fraser* died, from the Time of the Struggle aboard the King's Boat, he did not hear the said *Hugh Fraser* speak; only that when he was expiring, when one said he was gone, he answered, *Ay gone indeed*: That when this happened, there were nine Hogheads and a broken half Hoghead aboard of the Deponent's Boat; that the half Hoghead contain'd Wine, but what Liquor was in the Hogheads the Deponent knows not: That the foresaid Hogheads and half Hoghead, were taken in at *Tarbetness*, and were intended to be landed upon the *Murray Side* of the *Firth*, near where the Boat was when the King's Boat came up with them. *Causa Scientie*
pates.

patet. And this is Truth as he shall answer to GOD. And declares he cannot write.

JAMES GRAHAM.

Compeared DUNCAN GRANT junior Merchant in *Inverness*, married, aged twenty nine Years, who being solemnly sworn, purged of partial Council, examined and interrogate, *depones*, That in the Afternoon of *Wednesday* the 4th of *June* last, the Deponent being aboard of *William Fraser* Fisherman his Boat, in which *Hugh Fraser* of *Belhain* (deceased) likewise was, they discovered the King's Boat coming up to them; and when it was within a Boat's Length, or some more, the Deponent observed, that there were Soldiers aboard having Bayonets screwed upon the Muzzles of their Pieces: That *Hugh Fraser* called out to them not to be rash, and when the King's Boat had come along Side of the other Boat, so as that Corporal *Long* was come up to the Place of the other Boat where *Hugh Fraser* was, he, the said Corporal, aimed a Thrust at the said *Hugh Fraser*; but the Deponent did not see the Corporal touch *Fraser* with the Thrust: That when the two Boats were thus lying together, the said *Hugh Fraser* got up upon the Side of the Boat; but whether he stepped into the King's Boat, or was pulled in by the Soldiers, the Deponent knows not; the said *Hugh Fraser*, with one Hand, took hold of the Corporal's Firelock, and with the other *MacAdam's*, and at this Time by a Swell or Surge of the Sea, the said *Hugh Fraser*, Corporal *Long* and *MacAdam*, were thrown to the Bottom of the Boat: That Corporal *Long* immediately got up, and with the Butt of his Musket aimed a Stroke at *Fraser*, as he was lying in the Bottom of the Boat;

Boat; whether he hit him with that Stroke or not, the Deponent knows not: That some Person out of the King's Boat called to the Deponent, to come aboard of the Boat, and prevent Mischief: That the Deponent stept aboard, and the Sail of the King's Boat being up, he, by lifting of the Sail, discovered, that the said *Hugh Fraser* was in the Sea; that after he was taken out of the Sea into *William Fraser's* Boat, he immediately expired; and about this Time the Deponent saw *MacAdam's* Bayonet, which was screw'd upon his Piece, bloody: That the said *Hugh Fraser's* Cloaths being opened, he saw a Wound in his Breast; but the Deponent doth not know how he came by that Wound, having seen no Thrust given him, which might have occasioned it, only that when the Deponent challenged Corporal *Long* for giving the said *Hugh Fraser* the Wound, the Corporal did deny that he had given him any Wound; but said, that it was the Man behind him, meaning *MacAdam*, who had given the same: That there were some Hogheads and halt Hogheads aboard of *William Fraser's* Boat, which by the Bind appeared to be Wine Hogheads; but whether there was Wine in them or not, the Deponent knows not, not having seen any of them pierced. *Causa scientiæ patet.* And this is the Truth, as he shall answer to GOD.

DUN. GRANT junior.
JAMES GRAHAM.

Compeared DANIEL DINGWAL * Custom-house Boat-man at *Inverness*, married, aged Forty Years, who being solemnly sworn, examined, interrogate

* Cited by the Pannels.

terrogate and purged of partial Council, *Depones*, That in the Morning of *Wednesday* the fourth of *June* last, about four o'Clock, the King's Boat, aboard which the Deponent was a Sailor, observed another Boat under Sail, to which they made up; and as the King's Boat was drawing near to that other Boat, the Deponent heard some of the Persons from aboard the other Boat call to them on Board the King's Boat to keep off, otherwise they should have their Brains beat out; notwithstanding thereof the King's Boat came up with the other Boat, in which was *Hugh Fraser* of *Behain* younger, decess'd, and *Duncan Grant*, and after some Talking betwixt the Persons aboard the saids two Boats, these who were aboard of that Boat in which *Hugh Fraser* was, agreed to take on Board *John Robertson* the Tideman, in order to take Care of a Hoghead, a half Hoghead, and a Box that was aboard the said Boat: That having sailed for some Time in the *Murray* Firth, towards five o'Clock in the Afternoon the King's Boat made after another Boat, and when they were drawing near to that other Boat, some Persons on Board of her threatned those in the King's Boat to do them Mischief, if they dared come nearer; but nevertheless the King's Boat came upside with the other, in which was the said *Hugh Fraser*, *MacDonald* a Messenger, and *MacKinnon*, with others: That upon the two Boats lying Side to Side, the said *Hugh Fraser* stept into the King's Boat, whereupon Corporal *Long* and *Thomas MacAdam* Pannels, who were then sitting in the Stern of the King's Boat, got to their Feet and rested upon their Firelocks, upon which Bayonets were screwed: That the But of the said Firelocks was upon the Bottom of the Boat, and the said Soldiers

Soldiers were resting with their Hands about the Muzzle: That before this Time, the Deponent did not observe any Violence or Thrusts given by the Soldiers to *Hugh Fraser*, or any other Person, *Townson* the Land-waiter, having previously cautioned the Soldiers that they should offer no Violence; and so soon as the said *Hugh Fraser* came aboard the King's Boat, he caught hold with one of his Hands of the Muzzle of Corporal *Long's* Firelock, rested as above said; and with the other he got hold of *MacAdam's* Firelock, whereupon ensued a Struggle, which occasioned all the three to fall to the Bottom of the Boat: That soon after the saids three Persons rose, and the said *Hugh Fraser* fell into the Sea, while the Soldiers were standing by him, but he did not observe the said Soldiers, Corporal *Long* or *MacAdam*, take hold of him, or offer him any Violence which should occasion his falling into the Sea: That immediately after the said *Hugh Fraser* had voluntarily stepp'd from his own Boat into the King's Boat, and while he was struggling with the Soldiers, before they fell to the Bottom of the Boat, he was followed by *MacKinnon*, who pulled out a Pistol that he had hanging by his Side, and having therewith struck Mr. *Townson* the Land-waiter over the Head, the Deponent and one *Alexander Wright*, and *Thomas Smith* came up to *Townson's* Assistance, and wrested the Pistol out of *MacKinnon's* Hand, and having opened the Hammer of the Lock he discovered it was primed with Powder, which *Alexander Wright* blew out of the Pan; and this happened during the Struggle between the said *Hugh Fraser* and the Soldiers: That the Lock of the Pistol was whole and entire, and proper for firing, so far as the Deponent could observe: That some

some Time thereafter the said *Hugh Fraser* was dragged out of the Sea into the Boat belonging to *William Fraser*, and that after all was quiet in both Boats, he did observe the Bayonet belonging to *Thomas MacAdam* screwed off his Firelock, but that he did not observe this sooner, neither did he observe any Blood upon the said Bayonet: *Causa scientie patet*. And this is Truth as he shall answer to GOD: And declares he cannot write.

JAMES GRAHAM.

Compared Brigadier JOHN MOYLE * Commander in Chief of his Majesty's Forces in North Britain, married and aged Years, who being solemnly sworn, examined and interrogate, *Depones*, That he hath Orders to command the Troops in this Part of *Great Britain*; that they shall, when required, give Assistance to the Officers of the Revenue in the seizing of Goods, which are endeavoured to be run, and protecting of the same when seized: That the Deponent hath distributed Orders to all the Quarters where the Troops are, that they shall give Assistance in Manner above mentioned: That when a Soldier upon his Duty is invaded, and an Attempt made to disarm him, if such Soldier shall willingly part with his Arms, and not use his utmost Endeavours to have the free Use of them, such Soldier is liable to be prosecuted before a Court Martial, and to be punished for such Offence, with Death, or such other Punishment, as to the Court Martial shall seem meet: *Causa scientie patet*. And this is Truth as he shall answer to GOD.

JOHN MOYLE.

JAMES GRAHAM.

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Compared

* Cited by the Pannels,

Compeared Major MORDECAI ABBOTT, of the Earl of *Effingham's* Regiment of Foot, married, aged forty two Years, who being solemnly sworn, examined and interrogate, *depones*, That when a Soldier is upon any Duty, and being attacked or invaded, he willingly surrenders his Arms; or if he shall not use his utmost Endeavour to keep his Arms, that is deemed as a Mark of Cowardice, and such Soldier is liable to be prosecuted in a Court Martial, and to be punished with Death, or any other Punishment, as the Circumstances of the Case, and Merits of the Offence, shall appear to the Court. *Causa scientiæ patet*. And this is Truth, as he shall answer to GOD.

MORD. ABBOTT.
JAMES GRAHAM.

Compeared Major EDWARD POOLE, of Lieutenant *General Sabine's* Regiment, aged Years, who being solemnly sworn, examined and interrogate, *depones conformis præcedenti in omnibus*. And this is Truth, as he shall answer to GOD.

EDWARD POOLE.
JAMES GRAHAM.

Compeared EDWARD TOWNSON † Land-waiter in *Inverness*, married, aged forty five Years, who being solemnly sworn, purged of partial Council, examined and interrogate, *depones*, That in the Evening of *Wednesday* the Fourth of *June* last, he, on board of the King's Boat, came up with another Boat belonging to one *William Fraser*, aboard of which last Boat *Hugh Fraser* younger of *Belrain* was :

† Adduced by both Parties.

was: That the Deponent required Access to the Boat, to see what Goods were on board, but was refused, and threatned by those aboard of the Boat, but not by *Hugh Fraser*, if they should attempt to come aboard: That when the Custom-house Boat was lying aside the other Boat, *Hugh Fraser* jumped from his own Boat into the Custom-house Boat betwixt the two Pannels, who were then standing resting upon their Firelocks, with screw'd Bayonets: That a Struggle ensued betwixt the said *Hugh Fraser* and the two Soldiers, whereby all three fell to the Bottom of the Boat, and during the Struggle *Evan MacKinnon* Shoemaker in *Inverness*, jumped into the Custom-house Boat from the other, and having drawn a Pistol from his Side, and cockt her, he the said *MacKinnon* beat the Deponent with the said Pistol in the Head, whereby he was knocked down: That the Pistol was taken from *MacKinnon* by *Alexander Wright* and one *Thomas Smith*: That *Urquhart* one of the Boat-men informed the Deponent, that there was Powder in the Pan of the Lock of the Pistol, which he threw out: That he knows the said *Hugh Fraser* received a Wound in his Breast, of which he died; but how he came by that Wound, or who gave him it, he knows not: That together with *MacKinnon* came into the King's Boat *MacDonald* and *MacRae*; but the Deponent did not observe them at that Time have any Weapons in their Hands; however *MacDonald* had a broad Sword aboard of the other Boat, which the Deponent seized, and carried to the Custom-house. *Causa scientiæ patet.* And this is Truth, as he shall answer to GOD.

EDWARD TOWNSON.

JAMES GRAHAM:

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Compeared WILLIAM OGILVIE Tide-Surveyor of the Customs at *Inverness*, unmarried, aged thirty five Years, who being solemnly sworn, purged of partial Council, examined and interrogate, *depones*, That upon *Saturday* the last of *May*, the Deponent, who is Tide-surveyor, and had the Command of the King's Boat, did apply to Captain *Caulfield* of Colonel *Hamilton's* Regiment, who commanded the Forces at *Inverness* for the Time, That the Captain would allow him to have a Corporal and two Soldiers to go aboard the King's Boat, by Reason the Deponent had Information that a Ship was soon expected upon that Coast, wherein he was apprehensive some Goods might have been run : That Captain *Caulfield*, accordingly gave Orders, that Corporal *Long* and *Thomas MacAdam* and *John Brodd* should wait the Deponent's Orders, and go aboard of the King's Boat when required : That the Deponent ordered the Corporal and the two Soldiers to go by Land to *Cromarty*, and when these Men had come there, the Deponent ordered them aboard the King's Boat. *Causa scientie patet*. And this is Truth, as he shall answer to GOD.

WILLIAM OGILVIE.
JAMES GRAHAM.

Compeared JOHN BRODD, Soldier in Colonel *Hamilton's* Regiment of Foot, married, aged thirty three Years, who being solemnly sworn, purged of partial Council, examined and interrogate, *depones conformis* to *William Ogilvie* the preceding Witness, as to Captain *Caulfield*, and the Orders given by him, and having gone aboard the King's Boat at *Cromarty* with the two Pannels, by

by Order of the Tide Surveyor, about Four o'Clock in the Morning of the Fourth of *June* last, they came up with a Boat, wherein there was a Hoghead, half a Hoghead and a Box, and four Merchants, whereof *Hugh Fraser* of *Belnain* younger was one: That the Custom-house Officer aboard of the King's Boat, being desirous to get aboard of the other Boat to look after the Goods, he and they that were aboard with him, were threatned with Mischief, if they should attempt it; but thereafter the Persons aboard the other Boat becoming more pliable, received aboard their Boat *John Robertson* a Tidestman, who was left to take Care of the Goods, and having returned to *Cromarty*, *Mr. Townson* the Landwaiter came aboard the King's Boat, and sailed after some other Boats that had come from a Ship lying near the Coast, and after having sailed for some Time, they discovered, and made after two Boats, which separated from one another, when they saw the Custom-house Boat approaching, and having come up with one of the Boats which was making to the Shoar, they saw several Casks aboard, with *Hugh Fraser* younger of *Belnain* and some other Merchants; the Custom-house Officers were refused Access to that other Boat, and threatned if they should attempt to board her, but the Custom-house Boat having come clost to the other Boat, the said *Hugh Fraser* from that other Boat jumped aboard of the King's Boat, while Corporal *Long* and *Thomas M. Adam* were resting upon their Arms, towards the Stern of the Boat: That the Deponent being in the Stern of the King's Boat, was attacked by some Persons from aboard the other Boat, and being obliged to get into that other Boat, for the protecting of his Arms, which the other Persons were

were endeavouring to wrest from him : That in this Struggle he did not observe what became of *Fraser* and the other two Soldiers. *Causa scientiae patet.* And this is Truth, as he shall answer to GOD. And declares he cannot write.

JAMES GRAHAM.

Compeared THOMAS SMITH, Boat-man of the Custom-house Boat at *Inverness*, married, aged forty Years, who being solemnly sworn, purged of partial Council, examined and interrogate, *deponet*, That in the Evening of the Fourth of *June* last, the Deponent, aboard of the King's Boat, came up with another Boat near the Shore, loaded with some Goods, aboard of which was *Hugh Fraser* of *Bel-nain* younger, and *Duncan Grant* Merchants, when the Custom-house Officer aboard the King's Boat desired Access to look after the Goods aboard the other Boat, he was threatned with Mischiet if he should attempt to come aboard, by the said *Duncan Grant* : That *Hugh Fraser*, when the Custom-house Boat was along Side the other, jumped in betwixt Corporal *Long* and *Thomas M Adair*, who were standing upon their Arms, with the But-end at the Bottom of the Boat, and the Muzzles right up : one *MacKinnon* a Shoemaker in *Inverness*, with *MacDonald* a Messenger, and one *MacRae*, came aboard of the King's Boat immediately after the said Mr. *Fraser*, and *Mackinnon* during the Struggle Mr. *Fraser* had with the two Soldiers, came up, having a cock'd Pistol in his Hand, and therewith knocked down Mr. *Townson* the Landwaiter, and took from him a Blunderbuss, and threw it into the Sea ; the Deponent and one *Alexander Wright* coming up to assist Mr. *Townson*, wrested the Pistol out of *MacKinnon's*

MacKinnon's Hand ; and when the Deponent was disengaged of this Struggle, he saw the People of the other Boat hawling Mr. *Frazer* out of the Sea. *Causa scientiæ patet*. And this is the Truth, as he shall answer to God, and declares he cannot write.

JAMES GRAHAM.

Compeared ALEXANDER WRIGHT one of the Boat-men of the Custom-house Boat at *Inverness*, married, aged forty Years, who being solemnly sworn, purged of partial Council; examined and interrogate, *depones*, That the Time and Place libelled, before Mr. *Frazer* came into the King's Boat, he heard him ask the Question at the Soldiers, If they were to fire? Upon which the Soldiers said, they would fire; but before this Access had been demanded by the Custom-house Officer, and was refused: That the Deponent wrested the Pistol out of *MacKinnon's* Hand, and with which he had struck down *Townson* the Land-waiter, and opened the Lock of the Pistol, and shaken it, in order to throw off the Priming, if any was there; but whether there was any Priming in the Pan of the Pistol or not, the Deponent doth not know: That *MacKinnon* took violently a Blunderbuss from Mr. *Townson*, and threw it into the Sea. *Depones*, That *MacKinnon* was in the King's Boat before Mr. *Frazer* had got any Harm; for that he, *MacKinnon*, immediately followed Mr. *Frazer* into the Boat. *Causa scientiæ patet*. And this is Truth, as he shall answer to GOD.

ALEX. WRIGHT.
JAMES GRAHAM.

The

The Judge of the High Court of Admiralty ordains the Affize forthwith to inclose, and return their Verdict against To-morrow at Eleven a-Clock in the Forenoon, and the hail fifteen to-attend at that Time, each Person under the Penalty of Two hundred Merks, and continues the Diet till that Time; and ordains the Pannels to be carried back to Prison.

JAMES GRAHAM.

*Curia Jusficiaria Supremæ Curie Admiralitatis, ten-
ta in Prætorio Burgi de Edinburgo, vigesimo
septimo die Septembris, MDCCXXV. per bonora-
bilem virum Jacobum Graham de Airtb, Judi-
cem dictæ Curie.*

Curia legitime affirmata.

Intrant Thomas M'Adam and James Long, Pan-
nels.

The said Day the Jury returned their Verdict, whereof the Tenor-follows.

“ *Edinburgh*, the Twenty sixth of *September* One
“ thousand seven hundred and thirty five, the Af-
“ fize having inclosed, did chuse *John Coutts* to be
“ their Chancellor, and *James Steuart* to be their
“ Clerk, and having considered the Libel at the In-
“ fiance of *Duncan Forbes* Esq; his Majesty's Ad-
“ vocate, and *Mr. Hugh Forbes* Advocate, Procur-
“ ator-fiscal of the High Court of Admiralty,
“ against *Thomas MacAdam* and *James Long* Pan-
“ nels, the Judge of the High Court of Admiral-
“ ty his Interlocutor, and Depositions of the Wit-
“ nesses for proving thereof, and the Defences, su-
“ stained

“ stained for the above Pannels, they unanimously
 “ find it proven, That the Pannels *Thomas Mac-*
 “ *Adam* and *James Long*, are both guilty, Art and
 “ Part, of killing of *Hugh Fraser*; and by a Pu-
 “ rality of Voices do not find the Defences for the
 “ said Pannels proven, That the killing of the said
 “ *Hugh Fraser* was in the necessary Defence of their
 “ Lives. In Witness whereof their Presents, writ-
 “ ten by the said *James Steuart* Clerk, and sub-
 “ scribed Place, Day, Month and Year above-writ-
 “ ten.”

JOHN COUTS Chancellor.
 JAMES STEUART Clerk.

Lockhart produce Petition for *John MacDonald*
 and others, *Hugh Forbes*, *Dalrymple* and *Tod* received
 to answer against *Tuesday*.

Lockhart produce Petition for the Witnesses Ex-
 pence.

The Judge of the High Court of Admiralty con-
 tinues the Diet, for pronouncing Sentence against the
 Pannels, till *Tuesday* next, the thirtieth current, at
 Two a-Clock in the Afternoon, in the ordinary
 Court-place; and ordains the Pannels to be carri-
 ed back to Prison.

JAMES GRAHAM.

Curia Justiciaria Supremæ Curiae Admiralitatis, tena
in Prætorio Burgi de Edinburgo, trigesimo die
Septembris, MDCXXXV. per honorabilem virum
Jacobum Graham de Airth, Judicem dictæ curiæ.

L

Curie

Curia legitime affirmata.

Intrant Thomas MacAdam and James Long Pannels indicted and accused as before.

“ The Judge of the High Court of Admiralty having considered the Verdict of Assize returned against *Thomas MacAdam* Soldier in the Regiment of Foot commanded by Colonel *Hamilton*, and *James Long* Corporal in the said Regiment, upon the Twenty sixth of *September current*, whereby it is unanimously found proven, That the said Pannels *Thomas MacAdam* and *James Long* are both guilty, Art and Part, of the killing of *Hugh Fraser*; and by Plurality of Voices it is not found the Defence sustained for the Pannels proven, *viz.* That the killing of the said *Hugh Fraser* was in the necessary Defence of their Lives; the said Judge of the High Court of Admiralty, in respect thereof, by the Mouth of *John Dalgleish* Dempster, decerns and adjudges the said *Thomas MacAdam* and *James Long*, to be taken from the Tolbooth of *Edinburgh* to the Sands of *Leith*, within the Flood-mark, upon the third *Wednesday* of *November* next, being the Nineteenth of the said Month, betwixt the Hours of Two and Four of the Clock in the Afternoon, and there to be hanged by the Neck on a Gibbet till they be dead; and ordains all their moveable Goods and Gear to be escheat, and in-
 “ brought to his Majesty’s Use: Which is pronounced for Doom.

JAMES GRAHAM.



T H E

T R I A L

B E F O R E

The Judge of the High Court of
Admiralty of Scotland,

At the Instance of *Duncan Forbes of Cul-
loden Esq;* His Majesty's Advocate, and
Mr. Hugh Forbes Advocate, Procurator-
fiscal of the said High Court;

A G A I N S T

Duncan Grant junior Merchant in *Inverness*, *Evair
MacKinnon* Shoemaker there, *John MacDonald*
Messenger there, and *Murdoch MacRae* Horse-
hirer there.

*Curia Jusficialia Supremæ Curie Admiralitatis,
tenta in Prætorio Burgi de Edinburgo, quarto die
Novembris MDCCLXXXV. per honorabilem virum
Jacobum Graham de Airth, Judicem dictæ curiæ*

Curia legitime affirmata.

The Judge of the High Court of Admiralty
continues the Diet at the Instance of his Ma-
jesty's Advocate, and Procurator-fiscal of Court,
against

against *Duncan Grant*, and others (who were lawfully cited to this Day and Place) till Monday next the tenth of November current, at ten o'Clock in the Forenoon; and ordains the Parties, Witnesses and Affizers to attend at that Time, each Witness and Affizer under the Penalty of 100 Merks each.

Curia Jusficiaria Supremae Curiae Admiralitatis, tenta in Prætorio Burgi de Edinburgh, decimo die Novembris MDCCXXV. per honorabilem virum Jacobum Graham de Airth, Judicem dictae curiae.

Curia legitime affirmata.

Advocates for the Pursuers.

Mr. Hugh Forbes Procurator-Fiscal.

Mr. Charles Erskine his Majesty's Solicitor.

Mr. Patrick Haldane.

Mr. Hugh Dabrymple.

In Defence.

Mr. Robert Craigie.

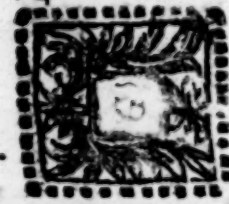
Mr. William Grant.

Mr. Alexander Lockhart.

Mr. James Geddes.

Intrant Pannels, Duncan Grant junior Merchant in Inverness, Evan MacKinnon Shoemaker there, John MacDonald Messenger there, Murdoch MacRae Horse-birer there, indicted and accused for the Crime of beating, bruising, or invading and forcibly binding the Officers of his Majesty's Revenue in the due Exercise of their Office, in manner mentioned in the criminal Letters against them thereanent, in Manner underwritten.

GEORGE,



GEORGE, by the Grace of GOD,
King of Great Britain, France and
Ireland, Defender of the Faith; To
Our Lovets,

Officers and Serjeants of Our High Court of Admiralty, in that Part of Great Britain called Scotland, conjunctly and severally, specially constitute, Greeting; FORASMUCH AS it is humbly meant and complained to Us by Our right trusty Counsellor *Duncan Forbes* of Culloden, Esq; Our Advocate, and Mr. *Hugh Forbes* Advocate, Procurator-fiscal of Our said High Court of Admiralty, for his Interest, UPON *Evan Mackinnon* Shoemaker in *Inverness*, *John MacDonald* Messenger there, *Duncan Grant* junior Merchant there, and *Murdoch MacRae* Horse-lirer there; THAT WHERE, by the Laws and Acts of Parliament of Our Realm, as well as the Laws and Practice of this and other well-governed Nations, all Riots and Violence, the beating, bruising, or invading any of the Subjects, and robbing or taking from them any Weapons they are lawfully entitled to wear, or forcibly hindring the Officers of our Revenue in the due Exercise of their Office, ARE Crimes of a high Nature, and severely punishable: And more particularly, by an Act in the sixth Year of the Reign of his late Majesty King George I. Our Royal Father of blessed Memory, intituled, *An Act for preventing Frauds and Abuses in the publick Revenues of Excise, Customs, Stamp duties, Post-offices and House-money*, it is inter alia enacted, "THAT from and after the first Day of August One thousand seven hundred

"died and twenty Years, if any Officer or Officers of the Customs be forcibly hindred, wounded or beaten in the due Execution of their Office, by any Persons armed with Clubs or any Manner of Weapon, tumultuously assembled in the Night or Day, to the Number of eight or more Persons, all and every Person and Persons so forcibly hindring, wounding, or bearing the said Officer or Officers, or such as shall act in their Aid or Assistance, being convicted thereof, shall, by Order of the Court by whom such Offender or Offenders shall be convicted, be transported to some of his Majesty's Colonies and Plantations in *America*, for such Terms as the Court shall think fit, not exceeding seven Years: And that if such Offender or Offenders shall return into *Great Britain* before Expiration of the said Term, contrary to the Intent and Meaning thereof, he or they so returning, shall suffer as Felons without Benefit of Clergy." YET TRUE IT IS, That the said

Persons above complained upon, are all guilty, Actors, Art and Part of all or one or other of the foresaid Crimes, and of the Offence against the said Statute. IN SO FAR AS the Officers of Our Customs in the Port of *Liverpool* having had Information, that Goods were intended to be run from a Ship then in the *Murray Firth*; and, in Pursuance of their known Duty, the Boat-men of the Custom-house Boat there, having on Board one or other of the Officers of the said Port, upon the fourth of *June* last past, or upon one or other of the Days of the said Month, cruized with their said Boat within the *Murray Firth* along the Coast; and *Edward Townson* Landwaiver in the said Port, *Thomas Smith*, *Alexander Wright*, *Walter Denoon*, *Donald Dingwall* and *Andrew Kay Boatmen*

men, and *James Long* Corporal, *John Brodd* and *Thomas MacAdam* Soldiers in the Regiment of Foot commanded by Colonel *Archibald Hamilton*, as their Assistants, being on board, and sailing near to the Town of *Nairn*, within a Mile or two, or within a few Miles of the said Town, they came up with a Boat, wherein the said *Duncan Grant*, *John MacDonald*, *Evan MacKinnon*, and *Murdoch MacRae*, above complained on, were, with their Associates, armed with Clubs and other offensive Weapons, and tumultuously assembled together to more than the Number of Eight Persons, and in which Boat they had Reason to suspect there were uncaptured Goods: And one or other of the said Persons above complained upon having cried out, That the Custom-house Boat had nothing to do there; and, if they did not leave them, *they should all repent it*, or Words to that Purpose; Upon Answer made by the said *Edward Townson*, That he was upon his Duty, and desiring Entrance into the said Boat, they the said Persons, or one or other of them, with their Associates, did immediately jump into the Custom-house Boat, and armed as aforesaid, did violently and desperately knock down, invade, and beat the said *Edward Townson*, the said Boat-men and Assistants, or one or other of them, and by Force and violently took a Blunderbuss from the said *Edward Townson*, and threw it into the Sea, or otherwise disposed of it at their Pleasure, while he and his Assistants were thus in the due Execution of their Office; WHERETHROUGH they were grievously hurt and impeded, stopt and hindered in the said Execution of their Duty and respective Offices: AT LEAST, the said *Edward Townson*, the said Custom-house Boat-men, and Assistants foresaid, or

one or other of them, were beat, knock'd down, and hindered in the due and lawful Execution of their Offices as Custom-house Officers and Assistants, and the Persons above complained upon were Art and Part of the same: Which Facts, or Part thereof, or the above Persons complained upon, their being Art and Part in any of the said Crimes, being found proven by the Verdict of an Assize before the said High Court of Admiralty, they ought to be punished with the Pains of Law, to the Terror of others to commit the like in Time coming. OUR WILL IS HEREFOR, and We charge you strictly and command, That incontinent thir Our Letters seen, ye pass, and in Our Name and Authority command and charge the said *Evan MacKinnon, John MacDonald, and Murdoch MacRae*, to compare before the Judge of Our High Court of Admiralty, within the Tolbooth or Criminal Court-house of Admiralty at *Edinburgh* the Fourth Day of *November* next to come, in the Hour of Cause, there to undergo the Law for the Crime above-mentioned, to the Effect that, being convict thereof, Justice may be administred upon them, conform to Law: AND SICKLIKE, That ye, in Our said Name and Authority, command and charge the said *Duncan Grant* above-complained upon, to compare and find sufficient Caution and Surety acted in the Books of Adjournal in the said High Court of Admiralty, that he shall compare before Our said Judge of the High Court of Admiralty within the Tolbooth or Criminal Court-house of Admiralty, at *Edinburgh* the said Fourth Day of *November* next to come, in the Hour of Cause, there to undergo the Law for the Crime above-mentioned, and that under the Pains contained in the Acts of Parliament; and

And that ye charge him personally, if he can be apprehended; and, failing thereof, at his Dwelling-house, and by open Proclamation at the Market-cross of the Head Burgh of the Shire, Stewartry, Regality, or other Jurisdiction where he dwells, to come and find the said Caution and Soverty, acted in Manner foresaid, within fifteen Days next after he is charged by you thereto, under the Pain of Rebellion, and putting him to our Horn: Wherein if he fail, the said Space being bypast, and the said Soverty not found, nor no Intimation made by him to you of the finding thereof, that incontinent thereafter ye denounce him Our Rebel, and put him to Our Horn, escheat and inbring all his moveable Goods and Gear to our Use, for his Contempt and Disobedience: And that ye, within fifteen Days thereafter, cause register thir Our Letters, with the Executions thereof, in our Books of Adjournal in the High Court of Admiralty, conform to the Act of Parliament. And if he come and find the said Caution and Soverty acted in Manhet foresaid (Intimation being always made by him to you or the finding thereof) that ye summon an Assize to pass upon the Trial of the said *Evan MacKinnon, John MacDonald, Duncan Grant, and Murdoch MacRae*, not exceeding the Number of Forty five Persons, together with such Witnesses as best know the Verity thereof, whose Names shall be given you in a List subscribed by the said *Duncan Forbes Our Advocate*, or the said Procurator-fiscal, all to compare before Our said Judge, Day and Place foresaid; the said Persons of Inquest, to pass upon the Assize of the said *Evan MacKinnon, John MacDonald, Duncan Grant, and Murdoch MacRae*; and the said Witnesses to bear seal and foothfast

M.

W 15.

Witnessing against them; ilk Person under the Penalty of One hundred Merks in case of Failure. **ACCORDING TO JUSTICE**, as ye will answer to Us thereupon. The which to do, We commit to you, conjunctly and severally, Our full Power by thir our Letters, delivering them by you duly execute and indorsed again to the Bearer. Given under our Signet of Admiralty, at Edinburgh, the 29th Day of September 1735.

Ex Deliberatione Judicis Supremæ Curie Admiralitatis.

ALEX. JOLLIE, Depute

LIST of Assizers in the Criminal Libel, at the Instance of Duncan Forbes of Col-loden Esq; his Majesty's Advocate, and Mr. Hugh Forbes Advocate, Procurator-fiscal of the High Court of Admiralty;

Against Duncan Grant Merchant in Inverness, and others.

MR. John Henderson Merchant in Edinburgh,
 William Kier Baxter there,
 Robert Purvis Merchant there,
 George Dunbar Merchant there,
 Patrick Crichton Merchant there,
 James Johnston Merchant there,
 Robert Montgomery Merchant there,
 James Dewar of Vogrie Merchant there,
 John Dewar Merchant there,
 Robert Forrester Merchant there,

John

John Douglas Armourer in *Edinburgh*,
 George Gray Merchant there,
 Archibald Hart Merchant there,
 Robert Clark Vintner there,
 Hugh Clerk junior Merchant there,
 Patrick Henderson Merchant there,
 Archibald Shiells Merchant there,
 James Shearer Barber and Wigmaker there,
 Oliver Tod Merchant there,
 William Millar Merchant there,
 Mungo Rannie Brewer in Westport,
 Thomas Cleghorn Brewer there,
 John Forrest Merchant in *Edinburgh*,
 Robert Lindsay Merchant there,
 Thomas Trotter Brewer there,
 William Aiton Goldsmith there,
 James Mitchelson Goldsmith there,
 James Nimmo Merchant there,
 Alexander Mason Merchant there,
 William Hamilton Bookseller there,
 George Millar Merchant there,
 Colin Robertson Wig-maker there,
 Archibald Cockburn Merchant there,
 Archibald M'Coul Merchant there,
 David Nevey Merchant there,
 John Brown Watch-maker there,
 James Hunter Wright there,
 Alexander Maitland Merchant there,
 John Cochran Merchant there,
 Thomas Crockat Merchant there,
 Robert Tod Merchant there,
 John Blair Wig-maker there,
 James Muirhead Merchant there,
 William Hamilton Brewer there,
 James Wight Litster there.

JAMES GRAHAM.
 LIST

L I S T of Witnesses in the Criminal Libel,
at the Instance of Duncan Forbes of Cal-
loden, Esq; His Majesty's Advocate, and
Mr. Hugh Forbes Advocate, Procura-
tor-fiscal of the High Court of Admiralty;
Against Duncan Grant Merchant in Inver-
ness, and others.

EDward Townson Land-waiter at Inverness,
John Brodd Soldier in Colonel
Hamilton's Regiment of Foot,
Alexander Urquhart,
Alexander Wright,
Donald Dingwal,
Andrew Kay,
Walter Denoon,
Thomas Smith,

} all Boatmen of the Cul-
tom-house Boat at
Inverness.

JA. ELPHINSTON Advocate-depute.

The Grounds of the criminal Libel and Indict-
ment, at the Instance of his Majesty's Advocate and
Procurator-fiscal of the High Court of Admiralty,
against *Duncan Grant, John MacDonald, Murdoch
MacRae* and *Evan MacKinnon*, being fully debate
viva voce, the Judge of the High Court of Admi-
ralty continues the Diet at the Instance of his Ma-
jesty's Advocate and Procurator-fiscal, against them,
till *Monday* next, the seventeenth current, at Ten of
the Clock in the Forenoon, and ordains both Par-
ties to give in their Informations betwixt and that
Time; the Pursuers to give in theirs betwixt and

Wednes-

Wednesday at Six a-Clock at Night, and the Pannels to given in theirs betwixt and *Friday* at Six a-Clock at Night, in order to be recorded in the Court-books; and ordains the Affizers and Witnesses to attend the said Diet, ilk one of the Affizers and Witnesses under the Penalty of One hundred Merks; and ordains the Pannels *MacDonald, MacKinnon* and *MacRae*, to be carried back to Prison.
JAMES GRAHAM.

Thereafter the Procurator-fiscal, Pursuer, declared he did not insist for *Grant's* being imprisoned; but craved, that his Bail may be continued: And signs this his Declaration.

HUGH FORBES.

Of Consent of the Pursuer, and what is craved, continues the Bail given for Grant's Appearance till the above Day; with Certification.

JAMES GRAHAM.



INFOR-

Nov. 12. 1735.

INFORMATION for His Majesty's Advocate, and Mr. Hugh Forbes Advocate, Procurator-fiscal of the High Court of Admiralty;

Against John MacDonald Messenger in Verness, Evan MacKinnon Shoe-maker there, Murdoch MacRae Horse-birer there, and Duncan Grant junior Merchant there, Pannels.

THE King's Advocate, and the Procurator-fiscal of the High Court of Admiralty, prosecute the Pannels for a Crime heinous and pernicious in its own Nature, and, as such, deservedly mark'd out for Punishment by the Legislature, viz. *binding, wounding, or beating an Officer of the Customs in the due Execution of his Office*, to which Crime the Law has, in certain Circumstances, annex'd the Penalty of a temporary Transportation.

As this would be a Crime, tho' the Act of Parliament had never been made, so it is laid, in the major Proposition of the Libel, as a Crime at common Law. And further, the Clause of the Statute, 6to Georgii I. Chap. 21. § 34. is recited, by which it is enacted, *That from and after the first Day of August, One thousand seven hundred and twenty Years, if any Officer or Officers of the Customs, be forcibly bindred wounded or beaten, in the due Execution of their Office, by any Persons armed with Clubs,*

Clubs, or any Manner of Weapon, tumultuously assembled in the Night or Day to the Number of Eight or more Persons, all and every Person and Persons so forcibly hindring, wounding or beating the said Officer or Officers, or such as shall act in their Aid or Assistance, being convicted thereof, shall, by Order of the Court, by whom such Offender or Offenders shall be convicted, be transported to some of his Majesty's Colonies and Plantations in America, for such Term as the Court shall think fit, not exceeding seven Years; And that if such Offender or Offenders shall return into Great Britain, before Expiration of the said Term, contrary to the Intent and Meaning thereof, be or they so returning, shall suffer as Felons, without Benefit of Clergy.

It is charged against the Pannels, "That they are all guilty. AEtors, A R T and P A R T, of all or other of the said Crimes, and of the Offence against the said Statute; in so far as the Officers of the Customs at Inverness having had Information, that Goods were intended to be run, and the Boat-men of the Custom-house, together with Edward Townson, an Officer of the Customs in that Port, and three Soldiers, having cruized in the Murray Firth, did on or about the 4th of June last, within a few Miles of the Town of Nairn, come up with a Boat in which the Pannels were, (with their Associates) armed with Clubs and other offensive Weapons, and TUMULTUOUSLY ASSEMBLED together, to more than the Number of Eight Persons; and in which Boat the Officers of the Customs had Reason to suspect that there were uncustom'd Goods; and one or other of the Pannels

“ Pannels having cried out, *That the King's Boat*
 “ *bad nothing to do there, and if they did not leave*
 “ *it, they should all repent it, or Words to that*
 “ Purpose. Upon Answer made by Mr. Townson,
 “ That he was upon his Duty, and desiring En-
 “ trance into the Boat, the Pannels, or one or o-
 “ ther of them, with their Associates, did imme-
 “ diately jump into the King's Boat, and armed as
 “ *aforesaid*, did violently and desperately invade
 “ and beat the said *Edward Townson*, and the Boat-
 “ men and Assistants, and violently took a Blunderbus
 “ from *Townson*, and threw it into the Sea, *while he*
 “ *and his Assistants were thus in the DUE Exe-*
 “ *cution of their Office, wherethrough they were grie-*
 “ vously hurt, impeded, stopt and hindered in the
 “ *due Execution of their Office*; at least *Townson* and
 “ the Boat-men and Assistants were forcibly bin-
 “ *dred and beat in the Execution of their Offices*;
 “ and all the Pannels are, or one or other of them
 “ is, Art and Part of the said Crime:” And the
 Libel concludes for the Pains of Law.

The Pannels denied the Libel, and made certain
 Objections against the Relevancy, as also a general
 Defence for all of themselves; and some urged some
 particular Circumstances in Defence of each. And
 it was said, That the Libel was not relevantly laid;
First, “ Because tho' every Thing contained in the
 “ Subsumption of the Libel should be true; yet the
 “ Conclusion would not follow, That they had trans-
 “ gressed the Act of Parliament: For five Things
 “ are thereby required, 1st, That the Officers be
 “ *FORCIBLY bindred*. 2^{dly}, That they be in the
 “ *DUE Execution of their Office*. 3^{dly}, That the
 “ Offence be committed by *arm'd Persons*. 4^{thly},
 “ That

That these Persons be *tumultuously assembled*. And
 5thly, That they be all in Number *Eight or*
more. And if any of these Requisites is not char-
 ged, the statutory Crime will not follow from
 the Libel: Now nothing is there charged, but
 that the Pannels were in a Boat, where the Li-
 bel does not say that uncustom'd Goods *actu-*
ally were, but only that they *were suspected to*
be there: So that it does not appear from any
 Thing in the Subsumption, that the Officers were
forcibly, or indeed *at all* hindred in the Executi-
 on of their Office.

2dly, It was pleaded, "That the Libel was not
 relevantly laid in that Member thereof, in which
 the Pannels are charged as *Art and Part* of this
 Crime; and that for two Reasons, 1st, Because
 this being a Statute concerning the Revenue, is
 to be regulated according to the Laws of *Engl-*
land; and in that Law the Term of *Art and Part*
 is not known: So that the Statute being specifick
 as to Persons *guilty* of the Crime, and expressing
 nothing concerning those who are *only Art and*
Part of it; those who are not *principally* guilty
 of the Crime, are not within the Statute. And,
 2dly, Because here is a Crime which by the com-
 mon Law would not be subject to so high a Pe-
 nalty as Transportation. And where Pains high-
 er than the ordinary Pains of Law are impos'd
 by express Statute, there nothing less will be sub-
 sicient than to charge, That the Pannels are *guil-*
ty of that precise Crime."

By Way of Defence, it was offered to be prov'd
 for all the Pannels, *That in Truth they were not*
within the Statute: For that the Fact was, "That
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“ three of the Pannels, *MacDonald*, *MacKinnon* and
 “ *MacRae*, the first of which is a Messenger, and
 “ the other two his ordinary Assistants, had been
 “ sent to execute a Caption against a Debtor, and
 “ were returning in a Boat to *Inverness*, when they
 “ were met by the Boat mentioned in the Libel,
 “ and were invited to come aboard by those in the
 “ Boat, which they did without the least Suspicion
 “ that they were to meet with the Officers: And
 “ tho’ it was admitted, that each of the three had
 “ a broad Sword, yet, when ever the King’s Boat
 “ came near, all the three laid aside their Swords,
 “ and none retain’d any Sort of Weapon, except
 “ *MacKinnon*, who had a small Pistol with a spoilt
 “ Lock, which he wore for Ornament rather than
 “ Service. And as for the other Pannel, *Duncan*
 “ *Grant*, it would not be alledged by the Pursuers,
 “ that he entred into the King’s Boat, till he was
 “ invited aboard as a Friend to interpose in a Scuffle
 “ which had happened there, and in which Mr.
 “ *Frazer* of *Belmain* had lost his Life. And for a
 “ Proof of Mr. *Grant*’s peaceable Inclination, it
 “ was further said, That on the Morning of that
 “ very Day, he having been aboard of another
 “ Boat, and Access having been demanded by the
 “ Officers of the Customs, he admitted them, and
 “ abandon’d what was in the Boat without Hesi-
 “ tation. And as for the Officers, that they were
 “ far from being in the due Execution of their Of-
 “ fice: That on the contrary, while those in the o-
 “ ther Boat were doing their best to fly from them,
 “ they pursued, and would have boarded them,
 “ notwithstanding that they called out *that they*
 “ *were at their Mercy*, or Words to that Purpose;
 “ and, in Pursuance of that Intention, that the Of-
 “ ficers

" ficers preparing to board the Boat, Mr. *Frazer* of
 " *Belhain* was pull'd, or unfortunately fell into the
 " Boat, and was there murdered by two Soldiers
 " now under Sentence of Death for that Crime;
 " and that it was not till after Mr. *Frazer* had re-
 " ceived his Death's Wound that any of the Pan-
 " nels entered the King's Boat. which was justifi-
 " able in them, after the Officers and those with
 " them had so far exceeded their Duty, as to mur-
 " der one of their Company: That they did not
 " forcibly hinder the Officers, but on the contrary
 " called to them, *that they were at their Mercy*;
 " and that, if they did beat or disarm any Officer,
 " such Act was posterior to, and therefore justified
 " and taken out of the Case of the Statute by the
 " Murder of Mr. *Frazer*, which could not fail to
 " irritate the Spirits of his Company, and to give
 " them reasonable Fear of the like Usage for them-
 " selves: That aboard the Pannels Boat there were
 " but *thirteen* Persons, and no Weapons, besides *three*
 " broad Swords which were thrown aside, and one
 " spoilt Pistol: That *Six* of the *Thirteen* were the
 " Crew of the Boat, who were there upon their
 " lawful Business, following their Trade, and can-
 " not be reckoned to make up the Number of
 " Eight Persons tumultuously assembled, any more
 " than if they had been common Passengers in a
 " Passage-boat, in which a Fray might have hap-
 " pened: That a Tumult, which is a *Concourse* of
 " many People, can hardly be supposed at Sea, and
 " far less in the Case of two small Boats meet-
 " ing; and consequently this could be no *tumultu-
 " ous Assembly* within the Statute: That the Offi-
 " cers were not *bindred*, but on the contrary made
 " good

“ good their Seizure. And from all this it was
 “ concluded, That this Case is out of the Statute,
 “ because the Officers were neither *forcibly bindred*,
 “ nor *bindred* at all; because they exceeded the
 “ *due Execution of their Office*; because here was
 “ no *tumultuous Assembly*, but an Assembly of Per-
 “ sons gathered together accidentally about their
 “ lawful Affairs, without any Combination or *In-
 “ tention to attack* the Officers; at least, because
 “ here was no *tumultuous Assembly to the Number
 “ of Eight*, after deducting the Boat’s Crew, far
 “ less of *eight Persons arm’d*, only *one* Person being
 “ *arm’d*; whereas the Statute requires, that if not
 “ not *eight*, at least *two* of the *Persons* assembled
 “ should be *arm’d*, by using the Word *Persons* in
 “ the Plural, and not *Person or Persons*, which is
 “ the usual Stile, and is used immediately afterwards
 “ in the same Clause.”

To these Objections and Defences the following
 Answers were offered; *First*, As to the Relevancy
 of the Libel, the Essence of the Crime is the *force-
 ble Hindring, Wounding, or Beating*; and it is ad-
 mitted, that there are certain necessary Requisites
 by the Act of Parliament, which must be necessari-
 ly charged and proved. But, upon Inspection of
 the Libel, it appears that all these Requisites are
 charged: For it is said, *First*, That the Pannels
 did *violently* knock down, invade and *beat Townson*,
 &c. and that Access being desired into their Boat,
 they jumpt into the King’s Boat, and disarmed
Townson, wherethrough the Officers were impeded,
 stopt and *bindred in the Execution of their Office*.
 2d^o, It is charged, That the Officers were in the
due Execution of their Office; and it is specified as
 to this Particular, That they were requiring Access

to a Boat in which they suspected uncustomed Goods to be, whichevery one knows is their Duty and their Right by exprefs Statute. And it is a Mistake to suppose, that it is necessary either to *charge* or to *prove* that uncustomed Goods were *actually* on Board the Boat, (tho' that also shall be proved) seeing the Officers have by Law a Title to search Vessels of every Kind, and not to rely on, what they would be sure to meet with, the Denials of those on Board. 3^{to}, It is charged in the Words of the Statute, That the *Pannels were*, with their Associates, *arm'd with Clubs and other Weapons*. 4^{to}, That they were *tumultuously assembled*. And 5^{to}, That they were, *to the Number of Eight or more Persons*. So that all the Requisites mentioned in the Statute are expressly *charged* in the Subsumption of the Libel; and therefore the Libel is relevantly laid, and, if the Facts are true, will infer the Conclusion drawn therefrom.

As to the Relevancy of *Art and Part*, it is known to the Court, that, by a special Statute in this Kingdom in 1592, it is not only *allowable* to libel Art and Part in all criminal Libels, but it seems to be made *necessary*: For the Act says, *That all criminal Libels shall contain that the Persons complained of are Art and Part*: So that if the libelling of Art and Part were neglected, it might be made an Objection against the Libel. And, as this Law is general concerning *all* criminal Libels; so it has not, in the Practice of near a Century and a half, once been pleaded, that Crimes provided against by posterior Statutes, without exprefs Mention of Art and Part, which seldom or never occurs, are not to be prosecuted according to the Directions of this Statute, tho' many of these statutory Crimes are made

made Capital. And therefore, in the *first* Place, It is no Objection to the libelling of Art and Part here, that the Words *Art and Part*, or something equivalent to them, are not to be found in the Act of Parliament: It is believed that no Instance can be given, even in our *Scottish* Acts, where these Words are express'd; but then, according to the Genius of our Law, they are always implied: For, with us, he who is Art and Part is guilty of the Crime; *Qui per alium facit, per se facere videtur*. And this is the Case, whether a Man gives his Council, his Command, his indirect Assistance, or in some Cases if he interposes Ratihabition to the Crime committed, and, in short, what is above simple Presence, or *nuda assistentia*. Wherefore, this being a *British* Statute, is in *England* to be applied according to the Rules of the Law of *England*, and to that of *Scotland* here. And as to the other Argument, "That, where a Punishment is heightned by a Statute, there it is necessary to charge every one of the Pannels with the direct specifick "Guilt, in the precise Terms of the Statute." The Pursuers are at a Loss to find out the Foundation of that Distinction; for the Act of *James VI.* makes none, neither does Practice make any: And there would be no Reason of making a Difference because this is a *British* Statute, seeing the Law of *Scotland* is still the Rule for applying it.

It is needless here to argue, that the Doctrine of Art and Part is no Peculiarity in our Law; we had it from the *Ope & Consilio* of the *Romans*: Every Nation has it. In *England*, Aiding and Abetting is very well known; and there in several Crimes and Trespases, all concerned are Principals: But, were it necessary, it appears that the Legislature had

a View to the Case of Accessories; for the Law provides, "That all Persons so forcibly hindring, &c. the said Officer or Officers, or such as shall act in their Aid or Assistance, being convict there- of, shall be transported." The Lawyers for the Pannels would have it, "That these Words relate not to the Criminals, but to those who act in Aid of the Officers:" And it was urged, "That otherwise the Law would be defective, because the beating and wounding the Assistants of the Officers, not being provided against by any other Words in the Clause, except these, Smuglers would have nothing to do but to beat and disarm the Assistants, and they would be out of the Statute, seeing nothing was done to the Officer himself." But it is answered, That this Interpretation cannot hold: He who beats and wounds the Assistants of an Officer, does most effectually binder the Officer; and therefore such Wounding or Beating is well provided against by this Statute, when the *Hindring of the Officer* is provided against. But the first Part of the Clause mentions only *Hindring, Beating or Wounding the Officers*; so that *Hindring, Beating or Wounding* any of the Assistants of the Officers, is not a Trespass against the Assistants by that Part of the Clause; and all the rest of the Clause evidently refers to this, by the Word, *SO, all and every Person or Persons SO forcibly bindring*: Which Word restrains the last Part of the Clause not to be more extensive than the first: And therefore the Words, *OR such as shall act in their Aid or Assistance*, are to be interpreted of such as act in the Assistance of the Persons *Hindring or Wounding*.

A Case was put for the Pannels, "What if any Crime were committed, and a By-stander should
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afterwards say, It was well done? That, it was said, would infer Art and Part; and yet it would be very hard, that upon so slender an Approbation any Man should be convicted as equally guilty with the Principal." To which this plain Answer is offered, That it is much doubted if a Case can be supposed, by which so transient an Approbation would be construed as Art and Part : But if from the Circumstances of such Approbation, which may be aggrivated and enforced by collateral Proof, it should appear to the Jury, that the Person thus approving was as guilty as the Principal, there is not by our Law any Reason why such Person should not be found guilty. And here the Pursuer shall leave this Objection against the Relevancy of Art and Part, resting assured, that so cardinal a Statute, so well established in our Law, and so necessary for avoiding continual Wranglings upon the Import of every minute Circumstance laid in every Libel, will not be found by the Honourable Judge to be in this Statute alone, repealed by Implication.

As to the Defence, it seems to proceed upon one general Mistake of arguing from Absurdities which would follow, if *every one* of eight tumultuously assembled, being prosecuted, ought to be punished by this Law, tho' there was only Proof of an actual Transgression of the Law against seven, or a smaller Number; a Proposition which the Pursuers would not be so absurd as to maintain. The Sum of the Pursuer's Argument is, That if any one shall be proved guilty of *forcibly binding, wounding, or beating* an Officer in a Tumult, where more than *eight Persons were assembled*, it will be no Protection to him, that some of the eight were wise enough

not to bring themselves under the Description of this Law. And, that the Answer may be the better understood, the true Fact shall be in a few Words opened, such as it is believed will come out upon the Proof.

MacDonald the Messenger, with *MacKinnon* and *MacRae*, who call themselves his Assistants, all three resolute Fellows, and willing and ready to assist the Smugglers, took some Pretext of a Caption, which they never saw, to be executed they knew not where, against they knew not whom, to go along with the Defunct *Mr. Fraser*, *Mr. Grant* the other Pannel, and two more Merchants of *Inverness*, aboard a Boat in the *Murray-Firth*, in which they were carried to *Cromarty*. There they were told, that the Person against whom they had the Caption, was not to be found : But it may be enquired, What carried them there ? Their Answer is, That one of the Gentlemen in their Company had the Caption. Next, They were sent across the *Firth*, to a Man on the other Side, still, if they are to be believed, to execute their Caption ; and yet they did not carry this Caption over with them. Where then was the Caption ? If it was left with the Gentleman at *Cromarty*, why did they cross the *Firth*, to put in Execution a Caption which they had left behind them ? If they were to find it on the other Side of the Water, why did they go to *Cromarty* ? This hangs very ill together ; but better than what follows. The Man to whom they were sent, told them, He had no Occasion for them ; and they took another Boat to go Home to *Inverness*. On their Way thither, they met their first Company, who had changed their Boat, and were taken aboard by them ;

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chasing, it seems, to go to *Inverness*, by steering the Course towards *Nairn*, which is just the contrary Way: And it is singularly unlucky, that these three Men, just fish'd out of the Sea, this Messenger and his Followers, should turn out to be, as the Pannels say, the only armed Men in the Boat; and that these three Volunteers should, by mere Chance, be the very Persons that boarded the King's Boat along with Mr. *Frazer*: This is left to be accounted for as the Pannels best can. Those aboard the smuggling Boat perceiving themselves to be chased by the King's Boat, took them aboard, they having each a broad Sword, and one of them a Pistol. Mr. *Grant* the other Pannel was on board this Boat; and when they perceived it was to no Purpose to flee, Mr. *Grant*, from the Boat, called out to those in the King's Boat, Not to come near, otherwise they should get a Mischief. But they persisting to demand Entrance, and the others being as positive in refusing it, the Boats came close together, when all at once, the deacest Mr. *Frazer*, with *MacDonald*, *MacKinnon* and *MacRae*, jumpt into the King's Boat; and while Mr. *Frazer* struggled with the two Soldiers, in which Struggle he lost his Life, *MacKinnon* knockt down Mr. *Townson* the Officer with the But-end of his Pistol, took his Blunderbuss, and flung it over Board, the other two being all the While in the Boat. This, it is conceived, is, in the strongest Sense, *binding* the Officer in the *Execution of his Duty*, not barely by the Act of knocking down and disarming, but by boarding the Boat, in which Act all the three were Principals; it was likewise *beating* the Officer, of which beating the other two, *MacDonald* and *MacRae*, were

Art and Part, by their boarding the Boat. And as to Mr. Grant, tho' he did not come out of the other Boat till a little afterwards, yet his being Art and Part of *binding* the Officer in the Execution of his Office, manifestly appears from his having called out, threatening the Officers if they offered to come aboard; and will likewise appear from other Circumstances upon the Proof.

From this Account, the wild Assertion of the Plea from *MacDonald* and his Assistants, is evident. Did Messengers expect to catch a Prisoner in the *Murray Firth*, when they neither had a Caption, nor knew whom they were in quest of? Was it purely by Chance that they were taken into the Boat at that critical Time, when the King's Boat was chasing her? Or was it not rather from an apparent Design of hindering the Officers in the Execution of their Duty? It is true, they laid aside their Swords when the King's Boat came up: But did they do this with a peaceable Intention? If so, how is that peaceable Intention reconcileable with boarding the King's Boat? It is to trifle with and abuse the Court; if they think to escape by so poor a Colour, as that they did this with an Intention the more effectually to disarm themselves. If that was their Intention, why did they not stay in the Boat? Why did they, on the contrary, board the King's Boat, and knock down the Officer with a Pistol? The Sight of three drawn Swords might have put those in the King's Boat upon their Guard, and then Boarding might not have been so easy: But coming in seemingly unarmed, would give less Dis-trust, and be more effectual; because their Arms lay within an easy Reach, or so as to be conveniently

ly handed to them by their Accomplices in their own Boat.

It may be likewise true, that they called out before the King's Boat came up, that they were in their Mercy; and, had they held there, it would have been well: But to make this an Argument to exculpate or excuse them from being immediately afterwards guilty of a positive Attack upon the Officers, is, as it was justly observed by the Honorable Judge, *Protestatio contra factum*.

In the same Manner, when it is pleaded for the Pannels, That they had no Combination or Intention to attack, and that the Officers were not *bindered*, because they *made good their Seizure*; it looks as if the Pannels inclined to mistake the Accusation against them: For whatever was their *Combination* or *Intention*, that they did *actually attack* is charged, and will be proved: Or if they did not, an Officer may be *forcibly bindered* as effectually by being *resisted* as by being *attacked*. That the Officer was not *disappointed*, was no Fault of the Pannels: They did a great deal, and possibly all they could to disappoint them; but the Law does not require, that he should be disappointed, but *bindered*. *Impeditus* would have been the Latin Word; and as *Hindering* and *Impedition* is the same, so *Expedition* is the same with *Forwarding* or *Furthering*. In our common Way of Speaking, *Hinderance* is commonly joined to *Lett* and *Molestation*; and, in Propriety of Speech, it differs a good deal from *Disappointment*; as *Furthering* comes from the same Original with *Before*, and means *Advancing*; *Hindering* means *Throwing behind*, or *Retarding*.

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As to what was said, That the unlucky Accident of Mr. *Frazer's* Death justifies this Attack upon the Officer, or, at least, extenuates it, so as to bring it out of the Case of the Act of Parliament: *First*, That depends upon a Point of Fact, of which the contrary will be proved, *viz.* That the Entry of the Three first Pannels into the King's Boat was *not till after* Mr. *Frazer* received his Wound. It will be made appear, that all the Three were in the Boat *at the Time* of his receiving the Wound. But *2dly*, It never was pretended, nor will it be proved, That any other Person in the King's Boat had the least Concern in the Death of, or Attack on Mr. *Frazer*, besides *MacAdam* and *Long*: Mr. *Townson*, as near as he was, was in no ways engaged in that Fray; and this the Pannels, if their Eyes were open, could not fail to see. If this be true, it would be strange Doctrine to pretend, that, because one of their Company was killed, they might jump aboard the King's Boat, and knock down the first Man they saw, tho' they could not but see, and know, that the Person upon whom they committed that Outrage, had not the least Concern in the Murder. And, *3dly*, The Comparison of Circumstances at that Time, cannot but yield a Conviction, that they knew nothing of Mr. *Frazer's* being killed, when they entered the Boat, and knockt down Mr. *Townson*. If they had done it in a Fit of Fury, to revenge the Murder, they would not have left their Swords behind: And that they entered having only a Pistol, is a Proof that their sole Intention was to obstruct the Seizure, utterly independent of the other melancholy Incident.

Thus far it seemed necessary to mention a few Things in Answer to what was urged for the Pannels

nels, rather by way of Circumstance than of direct Defence. To come then to the grand Defence, *That they are not within the Statute*: It is apprehended that every Branch thereof is defective.

For, *First*, Concerning what is said, *That the Officers were not in the due Execution of their Office*; It is sufficient for the Pursuers, if they prove, according to their Libel, that the Officer demanded Entrance into the Boat, and that it was *refused*; and that not barely by Words, but, what is stronger, by overt Acts. Nor is what was offered for the Pannels at all material, "That Mr. Frazer, being in the " King's Boat, was attack'd and murder'd by *Mac-Adam* and *Long*;" That unhappy Event did not deprive the Officer of his Right of prosecuting his Search, and making a Seizure; and the accidental Transgression of Part of his Company, who may have exceeded the *moderamen inculpatæ tutelæ* in their own Defence, has not the least Connection with the Officer, who ought not to have been hindered, far less invaded, unless he had had some Participation in the Murder. So much as to the Relevancy of this Branch: The Fact will come out quite otherwise in Proof, when it will appear, as has been said, that the Pannels were in the Boat, and hard at work, before Mr. *Frazer* received his Wound.

Next, *That the Officer was not forcibly bindered*, is not pretended otherwise than by a Criticism on the Word, which it will by no Means bear, as if nothing were a *Hinderance* but a *total Disappointment*; of which the contrary has been shown. He was *forcibly bindered*, when he was knock'd down with that Pistol which the Messenger's Follower wore it seems only *for Ornament*; besides getting a very bad Blow, as a Stroke on the Head with the But-

But-end of a Pistol, must necessarily be, which is separately relevant by the Act of Parliament.

As to the *third*, *That this was no tumultuous Assembly*; it seems to be a playing upon Words. That the Boat-men came there in the Execution of their lawful Calling, can scarcely be granted: Such Boat-men as neglect their proper Business, and enter into the Service of Smugglers, ought to know that they are not wholly guiltless of the unhappy Accidents which may follow; and it will be very proper in the Trial, to fix the *Art and Part*, by an Examination into the Calls which the different Persons had to be in that Boat. And tho' it is not charged in the Libel, that there were prohibited Goods aboard, yet it is not doubted but the Court will allow such Questions to be put as may tend to show, that the Sailors were in this Case more than bare Assistants; and particularly this, If there was not Brandy aboard in prohibited Casks? If there was, the Sailors must have known that they were *versantes in illicito*.

But not to follow the learned Arguments concerning what is, or what is not a *Tumult*, or whether a Meeting may be call'd *tumultuous*, where so few as Eight are assembled: Tho' it may be urged on the Side of the Pursuers as a very classical Definition of a Tumult, *whatever is done irregularly and contrary to Law*; nay, tho' Examples may be brought from approved Authors, where the Word is used in the Case of a single Person; here it is sufficient to say, that the Law has in this Case made that to be a *tumultuous Assembly* which consists of *eight Persons*. As to the Lawfulness of these Persons being there, it is not doubted, for Instance that the Pannels, tho' in a Company of more than eight

eight, were not *tumultuously* assembled, so long as they did nothing *tumultuous*; and it is as little to be doubted, that so soon as they began to *act tumultuously*, they were that very Moment a *tumultuous Assembly*, or, which is the same Thing, *tumultuously assembled*.

As to the *Fourth*, *That they were not assembled to the Number of Eight*, is not pretended; for they were *Thirteen*. But it is urged, That six of the *Thirteen* are not said to have *acted tumultuously*, being there about their lawful Calling, and are therefore to be deducted from the *Thirteen*, whereby seven only remain. The Answers to this are partly hinted at already: It can be no Sailor's lawful Calling to assist in carrying prohibited Goods. But further, if in a Meeting of *Thirteen*, Seven are in a *Tumult*, it cannot be denied that this is a *tumultuous Meeting or Assembly*; and tho' the other Six do not join in the *Tumult*, and consequently cannot be punish'd for it, yet it is plain that they are *peaceable Men in a tumultuous Assembly, consisting of Thirteen*. And from this the Distinction of the Case of a *Passage Boat* will obviously arise: For there every *Man* is unconnected one with another; but here the *Passengers* were assembled for one Purpose, *viz.* hindring the Officers in the intended Seizure of uncustomed Goods. The *Sailors* were there to the Purpose of transporting these Goods; so that all were about the same Business. Just as at Land, *Carters or Carriers*, who voluntarily undertakes the Carriage of such Goods, could not but be reckoned as Part of the same Company, to make up the Number of Eight. An Army of 40,000 Men at a Battle is still an Army of that Number, tho' it should happen that 20,000 should not actually engage in the Action. And in the

Case of Boarding, those who stay behind to guard the Ship are as much to be numbered effective Men as those who carry on the Attack.

As to the *fifth* and last, Whether it is necessary that all the eight Persons should be *arm'd*, or at least two of them? Or if it is at the very least necessary, that the Persons forcibly *binding, wounding and beating*, should be *armed*? It is conceived, that there is no Foundation for any such Objection in the Act of Parliament: For, as to the *first*, The Act does by no Means require that the Officer shall be *forcibly bindred by eight armed Men*, providing the Force is used by a *Person armed* where there is a *tumultuous Assembly of Eight or more*; and so the common Rules of Grammar would interpret it; it is not *Eight or more armed Persons*, but Eight or more Persons *tumultuously assembled*; and this is not only the Letter, but the Spirit of the Law: For it would be a poor Comfort to a *single Officer*, whom the Law supposes unarm'd, because in a civilized Country the Law executes itself, to be insured, that if *Eight armed Men* attack him, they shall be punished for it; but if only *Seven armed*, and *One unarmed* Man, all shall go free. It is plain that One armed Man against another Man unarmed casts the Balance, by holding the other, or tripping up his Heels. So that this is the only Interpretation which can be consonant to the Words and Meaning of the Law.

As to the *second* Case, That *two at least* should be *arm'd*, it should be of little Avail in the present Question, because there was among the Company at least three broad Swords and a Pistol; and surely it cannot be very material, whether the Aggressors had Arms *in their Hand*, or so much and so conveniently

ventently *at Hand*, that they could be rather more serviceable to the Purpose intended: But the Objection is founded barely on the first Words in the Clause, *Persons* in the Plural Number; to which an Answer may be very shortly made, That in the Statutory Words it stands, *All and every Person and Persons*. And 2dly, Because *Person and Persons* in the first Clause would have been ungrammatical, seeing a *Person* cannot be said to be *tumultuously assembled*; wherefore the Word *Persons* in the Plural is used, which comprehends the Singular.

And, as to the *third* Case, It may be true, that only one of the four Pannels had *actually* Arms in his Hand. But *first*, as has been said, Arms were at Hand sufficient for all the four. And 2dly, This depends upon what, 'tis hoped, the Court will over-rule, that Art and Part cannot be relevantly libelled in this Case. If that is over-ruled, it seems manifest, That, if an Officer is *forcibly billed and beat* by one *armed* Man, another Man or more, tho' *unarmed*, may be *Art and Part* of that Force.

The Case of Mr. Duncan Grant was in the Pleading a little distinguished from that of the others; chiefly upon these Circumstances, "That he acted nothing *tumultuously* or *unpeaceably*: That in the Morning he had abandon'd a Seizure in another Boat to the Officers: Tha the had not entered the King's Boat, upon the Occasion libelled, till he was invited aboard as a Friend after Mr. Fraser was wounded: And, that he was so much reckoned by the Officers to be their Friend, that he was by them trusted to carry the King's Boat back to *Mr. verness*, which he faithfully did."

As to all this, If Mr. Grant neither acted *tumultuously* himself, nor committed any *forcible Deed*, nor was *Art and Part* in any such Deed, then no doubt the Pursuers cannot prove their Libel, which charges at least *Art and Part* upon him: But it may be very true, that he did not once lift his Hand, nor stir out of the Boat, and yet he may have been as guilty as those who did. What brought him there? Traders are not aboard a Smuggling Boat for nothing: If the *inferior Agents* may be reasonably supposed to follow the Orders of the *Gentlemen* aboard the Boat, there is no Reason to doubt that Mr. Grant was in equal Command over them with Mr. Fraser; and it must be confessed in all Events, that Mr. Grant was found in very *suspicious Company*. That he gave up a *trifling Seizure* in the Morning, is nothing to the Purpose, and does not prove that he would not defend a *Seizure of Value* in the Afternoon. That he was *trusted* with the Boat is as little material; surely the Officers could not take it in their Heads that he would *steal* her: And that he entered not the Boat, is nothing to the Purpose, seeing he might have been *Art and Part* with those who did enter. It is believed it will come out in the Proof, that Mr. Grant was the Man who threatened the Officers with a *Mischief* if they approach'd, and possibly attended with other Circumstances of Guilt: But the Pursuers are not bound to say more than this, That the Defence, as it is laid for Mr. Grant, does not take off what is charged against him in the Libel, *viz.* That he was either *guilty*, or *Art and Part* of the Crime libelled.

As to the other Branch of the Libel, the Riot, the Relevancy cannot well be denied: If this is not a

Crime within the Statute, it is at least an egregious Breach of the Peace. And the Defence offered, "That some of those along with the Officer exceeded the Bounds of their Duty, by killing Mr. *Frazer*," is not at all relevant to take it off; unless it were alledged, that the Officer himself *exceeded* in his Office: For the two Soldiers transgressing the *Moderamen*, could give no Authority to the Pannels to invade One who was doing no Harm.

To conclude, If this pernicious Practice is encouraged of *braving* the Officers, and condemning the Authority of the Law; if the Value of a few Casks of *destructive*, or at best *unnecessary* Liquor, is to be preferred to the *necessary Service of the Nation*; every one must see what must be the Consequences: Not barely that the Publick must be just so far *defrauded* of what is destin'd to the Support of the *National Expence*, nor that the Sums *unjustly defraacted* from the Publick in this Manner must necessarily, for the Publick Service, be reimburs'd by other Taxes *heavier* than this, which is laid upon the *Superfluities of Life*, and *Instruments of Vice*, nor (even as terrible as that may seem) the *Destruction of our fair Traders*, and the *Exportation of our Money* to such foreign Countries as are our *Rivals in Trade*; but what is more to be dreaded than all these, the *Disregard of the Law* in this Particular will spread over every Branch of Execution; and, by the Example of the Success of so bad a Habit, the *biggest* Officers of the Law will at last come to be as much slighted as the *meanest*. Wherefore it is hoped, from the Justice of the Honourable Judge, that he will find the Pannels being *Guilty* of the Crimes libelled, or *Art and Part* thereof, relevant

to infer the Pains of Law, and to repel all the Defences proponed for the Pannels.

In Respect whereof, &c.

HUGH DALRYMPLE.

Nov. 14, 1735.

INFORMATION for John Macdonald Messenger in Inverness, Evan Mac-
kinnon Shoemaker there, Murdoch Mac-
rae Horse-birer there, and Duncan Grant
junior Merchant there, Pannels;

*Against his Majesty's Advocate, and Mr.
Hugh Forbes Advocate, Procurator-Fiscal
of the High Court of Admiralty.*

THE said Pannels are indicted and accused, as
guilty of a Trespas of the Act of the 6th of the
late King, by which, *the forcibly binding, or beating
an Officer of the Customs, in the due Execution of his
Office, by Persons armed,* to the Number, and with
the Circumstances therein described, is made punish-
able by no less than Transportation to *America* for
seven Years, under Pain of Death if they return in-
to *Great Britain*; at least they are charged with
having committed an Offence against the Common
Law, or being Art and Part of the same, by beating
and hindring a Custom-house Officer and his Assis-
tants in the due and lawful Execution of their Offi-
ces. And upon this Accusation the Pannels being
brought from *Inverness*, the Place of their Abode,
to undergo a Trial before the High Court of Admi-
ralty; they did, in the first Place, deny the Libel as
it

it stands, and insisted, That they were not guilty of any Offence against the said Statute, or of any Riot deserving Punishment, even by the Common Law; for that they were by no means concerned or engaged in a tumultuous Assembly of eight armed Persons, who had assaulted, forcibly hindred, or beaten a Custom-house Officer, in the due Execution of his Office: But that the Truth of the Case was, that in case any one of the Pannels happened to do any Act of Violence at the Time libelled, it fell out after this manner: That the Pannels being occasionally and accidentally got together into the same Boat, in which was also the deceased *Hugh Frazer of Belnain* and the Boat's Crew, consisting of six Rowers and a Steersman, that the Company who were thus got together, and were passing along in this Boat, were altogether but the Number of five, besides the Crew of the Boat it self; and even to that Number were by no means a Company of armed Persons, there being none of them who had any Thing like Arms, if it was not *John Mac Donald* the Messenger, or the other two Pannels, *MacKinnon* and *MacRae*, his Assistants, which it is both lawful and usual for such Persons to bear, and is more especially necessary in that Country, which is the Neighbourhood of the Highlands, where the Messengers are apt to meet sometimes with Resistance, and to this Messenger who happens to be maimed of an Arm: That there was no sort of Combination or Assembly of these Persons together, with Intention to beat or knock down, or to assault the Custom-house Officers; but that when the Custom-house Boat came up with the Boat in which the Pannels were, having had Information, as the Libel bears, that Goods were intended to be run from a Ship then in the *Murray Firth*, the

Pannels did not behave themselves as Persons affociated in order to make a forcible Resistance; for that even such in the Company as had any Thing like Arms, laid them down, instead of using or employing them to do an unlawful Act: And that the unfortunate Gentleman decaft, Mr. *Frazer*, who was also utterly unarmed, having observed the Custom-houle Boat advancing with armed Soldiers in it, having called out to them not to fire, or hurt any Personⁿ in the Boat with him, for that they were in their Will; and the Custom-houle Boat coming up at the same Time clofs with the other, the said decaft Mr. *Frazer*, either being apprehensive of Harm from the Soldiers Guns or Bayonets, and endeavouring to pary or turn them aside with his naked Hand, or by some other Accident, having stept or been pulled into the Custom-houle Boat, the particular manner of which the Pannels are not concerned with, further than to take Notice, for their own Defence, that it was no Evidence of a tumultuous and armed Assembly, forcibly to hinder the Custom-houle Officers: For that Mr. *Frazer* was both alone and unarmed when he stept into the Custom-houle Boat; but being there, he became some Way or other unhappily engaged in the Hands of the armed Soldiers, who were aboard that Boat; and that in such a manner, that some of the Pannels came to be in the utmost Pain for the poor Gentleman, lest he should receive some Mischief from the Hands of the Soldiers, as the Fate of the Event which followed shewed but too truly the Reasons there were from such Apprehensions; and seeing such Violence going on, and that there were other Persons also armed in the Custom-houle Boat besides the Soldiers, they went into that other Boat; and if any one of them did attempt to disarm, or use the least

least Violence against Mr. *Townson*, it was then only, and no sooner, than either after the decease Mr. *Frazer* had received the deadly Wound, for which two of the Soldiers have been since convicted, and condemned to Death; or at least when the Soldiers were grappling with him, and employed in that violent Scuffle which ended in his Death, that any of the Pannels stept on board the King's Boat; and yet even then, only one of them had any Thing like Arms about him, or attempted to use any Force even by way of disarming or Defence, to prevent further Mischief: So far was it from being true, that this Boat in which the Pannels were, consisted of a tumultuous Assembly for the unlawful Act libelled, that even two of those who went on board the King's Boat, in order to prevent Mischief, or to take Care of the poor Gentleman now deceased, did not use any Act of Violence or Force whatever: And as to the third, who may have disarmed Mr. *Townson*, and that in order to that, he had even given him a Blow, being done in these Circumstances, it appears to have been occasioned immediately by the Mischief that was then done, or just about to be done, upon Mr. *Frazer*; and was therefore only mean'd as an Act of Self-defence, to prevent further Mischief, and by no means as an Attempt to hinder the Officer by Force to do his Duty, which Duty he actually did and accomplished; and that the other Pannel, *Duncan Grant*, in the mean while did not even step into the Custom-house Boat, until he was called and invited by some of the Company of that Boat it self, and being there, laid his Hands upon no Man whatever; but after Mr. *Frazer* had received his deadly Wound,

Wound, thought it his Duty to assist in an Office of Humanity, to take care of the Defunct's Body, in order to which he obtained from Mr. *Townson* the Use of the Custom-house Boat to go to *Inverness*; which he did accordingly, and restored the Boat next Day; so that he was in every respect as innocent and free of any Force or riotous Act whatsoever, as any Man could be, who was then at a Distance upon Land, or as the Crew in the Boat, who never stirred from their Oars.

This being the true Manner and Occasion in which any one forcible Act may have happened, whether by a Blow or disarming Mr. *Townson*, by one of the Pannels, it was for them pleaded, That there was no sufficient Ground for bringing all these four Persons to Trial, in order to the severe Penalty of a seven Years Transportation, or even as guilty of a riotous Act against the Common Law; for the single Act of Violence that may have been done by one of them only, had but too just and melancholly an Excuse, when it was occasioned by the Assault made by the Soldiers on Mr. *Frazer*, wherein the poor Gentleman, single and unarmed, was killed upon the Spot.

The Pannels cannot doubt, but that the Force of Truth will bring out some of the most material Circumstances of the Fact, as above set forth, for their Justification, even against a Riot; and that though they should call or cite none but the Pursuers own Witnesses for Proof thereof: For any other Witnesses they could get, live at so great a Distance, that the Pannels cannot have the Opportunity to prove every minute Circumstance of what happened to each of them before their coming into the Boat, without a greater Delay and Expence, and Continuance of
 their

their Imprisonment, by protracting the Trial. All which would be a greater Inconvenience, than the Help of these remoter Circumstances to their Defence would deserve. And therefore they do humbly insist, and put their Defence upon their Objections against the Relevancy of the Libel, as it is laid on the Statute, and on their Defence against the other Branch of it, from what happened at the very Time libelled it self; which being undeniably true, they are hopeful and confident must come out upon any Trial and Examination that shall be taken: And these Objections and Defences they do humbly insist are good and sufficient, notwithstanding what has been offered in Reply to them.

The Pannels have nothing to object against the Truth of the *major* Proposition of the Libel; nor do they deny, That the hindring, wounding, or beating an Officer of the Customs, in the due Execution of his Office, is a Crime heinous and pernicious in its Nature, and deservedly severely punishable by the Law: But it must also be admitted, that Transportation or Banishment for the Space of seven Years, of Persons who have Wives and Families at home, and are engaged in settled Business for the Maintenance of their Families, is a fore and grievous Penalty; and that when the Law has inflicted the same by particular Statute, upon a Crime consisting of certain Circumstances therein described particularly, the same ought not to be extended to other Cases, that fall not within the Description or Sanction of the Law: For it is a Maxim of common Justice, the Observance of which is essential to the Liberty of the Subjects, That no penal Statutes, especially such as are highly penal, ought to be strained and extended beyond the express Pro-
vision

vision of the Law, which in the present Case, in the Statute libelled, is conceived in the following Words, *That from and after the first Day of August, One thousand seven hundred and twenty Tears, if any Officer, or Officers of the Customs, be forcibly biadred, wounded or beaten, in the due Execution of their Office, by any Persons armed with Clubs, or any Manner of Weapon, tumultuously assembled in the Night or Day, to the Number of Eight or more Persons, all and every Person or Persons so forcibly hindring, wounding or beating the said Officer or Officers, or such as shall act in their Aid or Assistance, being convicted thereof, shall, by Order of the Court, by whom such Offender or Offenders shall be convicted, be transported to some of his Majesty's Plantations in America, for such Terms as the Court shall think fit, not exceeding seven Tears; And that if such Offender or Offenders shall return into Great Britain before Expiration of said Term, contrary to the Intent and Meaning thereof, be or they so returning, shall suffer as Felons, without Benefit of Clergy.*

The Libel charges the Pannels as guilty, Actors, Art and Part; *first*, of the Offence against the said Statute, "In so far as the Officers of the Customs at *Inverness* having had Information, that "Goods were intended to be run from a Ship "then in the *Murray Firth*, one or other of them "went with the Custom-house Boat, and a Corporal and two Soldiers as their Assistants, and "cruized along the Coast near to the Town of "*Nairn*; that they came up with a Boat wherein "the four Pannels were with their Associates, armed with offensive Weapons, and tumultuously "assembled together, to more than the Number of

“ eight Persons; they the said Pannels, or one of
 “ other of them, with their Associates, did immediately
 “ jump into the Custom-house Boat, and
 “ armed as aforesaid, did violently invade and beat
 “ the said *Edward Townson*, the said Boat-men and
 “ Assistants, or one or other of them, while he and
 “ his Assistants were thus in the due Execution of
 “ their Office.”

Against the Relevancy of the Fact, as thus set forth in the Libel, it was for the Defenders insisted, That the same did by no Means come up to the Terms of the Statute; for this Reason principally, that the Libel alleges only, That one or other of the Pannels did beat or disarm the Officer: And in the Debate and the Pursuers Information, it is not pretended, that more than one, *viz.* the Pannel *MacKinnon*, did actually perform such Violence, And supposing in the present Argument, that this had been unjustifiably done by that one Person, and that there had been other seven Persons in the Boat from which he came, besides the Crew thereof, none of which committed the like Violence; or did act or perform any overt Fact, in the Aid or Assistance of the said *MacKinnon*, in that Violence of his, it would by no Means follow, that these other Persons who had been in the same Boat with him, could be conjoined or considered as making up with him a tumultuous Assembly of eight Persons, which constitutes the Essence of the Crime restrained by this Law.

And, in the *first* Place, it was observed, That the proper and known Sense of these Words, *tumultuously assembled together*, has a Signification, and raises an Idea, which can hardly at all be applied to Persons who happen to be aboard together in the same

same Vessel at Sea; who, if they about an unlawful Act, may be unlawfully assembled, and if they are Rebels or Pirates, may be treasonably or piratically assembled; but a tumultuous Assembly supposes a Concourse of People running together from different Parts, and who are capable of being dispersed, in order to put an End to that Tumult; which cannot happen in a Vessel at Sea.

The Case is much the same as that provided against by the Act of the first of the late King, commonly called the *Riot Act*; by which Persons, to the Number of twelve or more, being unlawfully assembled to the Disturbance of the publick Peace, and being commanded to disperse themselves, if they riotously continue together for one Hour after such Command, they shall be adjudged guilty of Felony; which is another most severe Statute against tumultuous Assemblies, in the most proper Sense; and yet such a tumultuous, riotous, or unlawful Assembly could hardly be said to occur aboard a Ship or Boat at Sea; for these being commanded to disperse themselves, how should they, or any of them, who were most willing to obey the Law, and to avoid the Pains of Death, be able to withdraw or disperse themselves from the rest? Must they of Necessity throw themselves into the Sea, and be drowned, in order to avoid being hang'd at Land? This Instance therefore serves to show, that a tumultuous Assembly supposes a Concourse of People which is capable of being dissipated or dispersed.

But 2^{dly}, Supposing it a possible Case that a tumultuous Assembly, in the Sense of this Statute, may be found aboard a Vessel at Sea; yet the violent Acts of one Man aboard such Vessel, can ne-

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ver with any Justice or Propriety compose a Tumult, or make the other Persons aboard with him, who were there occasionally passing along, or pursuing their Voyage or Business of whatever Kind, and who behave themselves innocently, quietly and peaceably, to be accounted Part of that Tumult, and liable to the high Penalty of Transportation as such: For at this Rate, the most innocent Persons living might come to be unavoidably engaged in the Presence of one or two ill-designing Persons, and by their unlawful Act be exposed to the Penalties of this Statute. If it were no more than passing in such Company in a common Ferry-boat, into which one or two Smugglers enter, having perhaps along with them secretly a Parcel of uncustom'd Goods; and if an Officer of the Customs suspecting this, should come up to search the Passage-boat, and that one Smuggler, or these two, should violently resist or beat the Officer, at this Rate the whole Company would be equally punishable.

Nor does it make any essential Difference, that in the Case of a Passage-boat, the Absurdity of what this Libel supposes is more glaring, and the Defence of the Passengers would be more obvious; for in Reality there is no solid Difference betwixt a Vessel of that Kind and any other: For it is no less lawful and innocent, and free to every Subject, to pass unmolested in any other Vessel, or from one Place of the Coast to another, upon any Occasion that he may have; without incurring the Penalties of any Law, which he himself does not actually and positively transgress.

Nor does it alter the Case, that this was a Boat in which the Custom-house Officers suspected that there were uncustom'd Goods, which is all that the

Libel

Libel alledges; or tho' it had been alledged, and should be proved, that in Fact there were such Goods seized aboard that Boat: For it does by no Means follow from thence, that every single Person who happened to be aboard the same Vessel, were privy to, or conscious of the Design of running these uncusom'd Goods, or that they knew there were any such on board. Nay further, tho' this also could be inferred from their naked Presence in the Boat, it would by no Means follow, that they had engag'd themselves in such a dangerous and desperate Attempt as the committing an Offence against this Statute, by forcibly hindring, or beating, or wounding the King's Officers; for tho' the running of Goods clandestinely be an unlawful Act, it is not an Offence of such a bold and high Nature as what is controul'd by this Statute; and many Persons may suffer themselves to be misled into the one, who will not be made or wicked enough to engage or take Part in an Attempt against the other. And as it is the latter only, namely, the actual Force and Violence used, and not barely the Privy or Accession to an Attempt for the clandestine running of Goods, which is restrained by the high Penalties of this Statute, it can never support the Relevancy of a Libel thereon, that the Persons complained upon were found in the Company, or in the same Ship where there were actually uncusom'd Goods seized: Nay, tho' it were libelled that they were concerned in these Goods, if they were noways active in committing such Violence as the Statute restrains; and far less is it relevant, when nothing more is libelled, but that the Officers of the Customs suspected that Boat wherein they were, and that one or other of the Persons in the Boat with them had forcibly hindred

or

or wounded the Officer. For if this be relevant, then it must follow in every Case, even of a Passage, that naked Presence alone of other Persons to make up the Number of eight, where any one is guilty of this unlawful Violence, is sufficient to make the whole Company liable to Transportation; and it would be in the Power of a single, wicked, or malicious Smuggler, to convert the most innocent Number of People in the same Vessel with him, into a tumultuous Assembly: Whereas nothing appears more evident than the Sense of the Statute, that there must be eight Persons concurring and acting in a tumultuous Manner, by some positive and direct Acts of their own, in order to expose them, or any of them, to the Penalties of the Law; and if one Person, or any Number less than eight, shall be guilty of forcibly hindring or wounding an Officer, it would no doubt be a Crime to be punished by the Law, but would certainly not be comprehended within this Statute. And as the Libel does not alledge, nor could the Prosecutors in the Debate affirm, that eight Persons concurred and acted in the Violence and Invasion libelled; or even that all the four Pannels were so active, or that any more than one of them was truly guilty of Violence: It follows, that tho' all were true which the Libel sets forth, it would not amount to the Crime described in the Statute; and consequently that the Libel is most irrelevant, in so far as it is founded on That.

The Pannels apprehend that the Pursuers have offered nothing material to elide this Objection; but on the contrary, it is admitted in their Information, the End of *Page* 9th, that this would be an absurd Proposition, *viz.* "That every one of eight tumultu-

“ ruously assembled ought to be punished by this Law, though there was only Proof of an actual Transgression of the Law against seven, or a smaller Number.” And if so, how can this Libel be relevant which charges the actual Transgression of the Law, by forcibly hindring, wounding or beating upon one of the Pannels only? for it does no more. Such as remained quietly in their own Boat, or such as stepped into the Custom-house Boat without Arms, and who laid Hands upon no Man in it, cannot be said in common Sense or Justice to have been guilty or active in forcibly hindring, wounding or beating an Officer; nor yet can the Emission of any Words whatever be equivalent to the actual Use of Force or Invasion of the Officer’s Person.

The Pursuers are indeed pleased to say, “ That if any one shall be proved guilty in Terms of the Statute, in a Tumult where more than eight Persons were assembled, it will be no Protection to him, that some of the eight were wise enough not to bring themselves under the Description of this Law.” Now, in the 1st Place, this a fair Admission, that every one of the Pannels who shall not be proved to have forcibly hindred, wounded or beaten the Officer, does not for himself come under the Description of the Law; but that by being so wise as to remain quiet and inactive, he keeps himself out of it: But if he does, how then can his Presence serve to compose the Tumult, so as even to bring that single Person who acted violently, within the Description of the Statute?

To maintain this, the Pursuers have advanced, as a very *classical* Definition of a *Tumult*, what must be admitted a very pleasant one, *viz.* “ That what-

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“ ever

“ever is done irregularly and contrary to Law is a
 “Tumult.” According to which every Crime or
 Offence, even such as a Man may commit alone, or
 with one or other Person, such as Theft, Adultery,
 Murder, every Thing would be a Tumult. But in
 this Argument, surely the Pursuers are not serious.

It is again admitted in the same Paragraph,
 “That the Pannels, though in a Company more
 ‘ than eight, were not tumultuously assembled, so
 “ long as they did nothing tumultuous :” Which
 is all that the Pannels are pleading, and consequent-
 ly that the Libel which charges not that eight Per-
 sons acted tumultuously, but that some one or other
 of the eight committed Violence, cannot be relevant
 in the Terms of this Law. But we cannot again
 agree with the Pursuers, who retract this again in
 the next Page : where it is said, “ That if seven Per-
 “ sons of thirteen act tumultuously, the whole is a
 “ tumultuous Meeting, and the six innocent Per-
 “ sons are peaceable Men in a tumultuous Assem-
 “ bly consisting of thirteen” For though it may
 be true in some Sense, that a very few turbulent
 Persons may raise a great Disturbance and Uprore
 in a numerous Assembly ; yet in the Sense of this
 Statute, which requires eight guilty Persons to be
 tumultuously assembled, that the peaceable Men
 should be taken into the Account to make up the
 Number ; and far less that these innocent or peace-
 able Men themselves should be brought to Trial and
 punished with Transportation for the Misfortune of
 having been in the Presence, or bad Company of a
 single Person who committed Violence, whilst they
 were noways concurring or active in it.

As to that Part of the Debate, upon the Rele-
 vancy of Art and Part of the Statutory Crime, the
 Pannels

Pannels apprehend it is unnecessary to enlarge upon it; for that the Debate on that Head is pretty much a Controversy about Words; they did not pretend that Art and Part, or Accession to a Crime is a Peculiarity of the Law of *Scotland*; it has no doubt the same Meaning with *ope* & *concilio*, or *aiding and abetting*. And thus in the ordinary Crimes against the Law of Nature and Nations, which are understood by a single Word or known Name, such as Theft or Murder, whoever knowingly and wilfully contributes, either by his Advice or Aid, to the Commission of any one Act of these, is criminal, and a Transgressor of the Laws forbidding them: But where a Crime is described by a particular Statute, that being so and so circumstantiated, it shall be attended with such and such a Penalty; it is impossible then that any Person can be guilty in the Terms of that Statute, unless his own Actions fall within the Description thereof. And because the Pursuers are pleased to find fault with the Instance which was supposed of a subsequent Approbation, which they are sensible could not be maintained to fall within the Sanction of this Law, tho' that is one of the ordinary Species of Accession mentioned by Lawyers. We shall put the Case of another more gross and palpable Act of Accession: Suppose that a Person, not present in a tumultuous Assembly, had yet been privy to the Design, and had given Advice and Instructions to the Actors in what Manner to go about it, or had even lent or furnished one of them with a Weapon to be employed in that Enterprize; we apprehend, that such a Person would be exceeding guilty, and well deserved to be punished; but still we apprehend, he could not with any Justice or Propriety, be said to fall within the Description of this

this Statute, or to be one of the eight armed Persons, who had forcibly hindred, wounded or beaten an Officer in the Execution of his Office.

As to the Clause of the Statute itself, the Pannels apprehend it can yield no Argument for supporting the Relevancy of Art and Part in this first Branch of the Libel; for that these Words, *Or such as shall act in their Aid or Assistance* are truly meant, and to be understood of the Persons invaded, wounded or beaten, namely the Assistants of the Officers, and not of the guilty Persons invading, wounding or beating; for which it is unnecessary to enter into Argument, being upon the Sense or Construction of a plain Clause, which is at Length above inserted, and the Import of it is submitted to the Judgment of the Court, without repeating the Words here again.

Again, supposing for once, That these Words, *Or such as shall act in their Aid or Assistance*, could be understood of the criminal Persons, then the Law has defined what Sort of Accession is to be punished, namely, *such as are active*, or concur and take part in the very Violence itself; which cannot be affirmed of those who are barely present, without lifting a Hand or presenting a Weapon, or being any ways active in committing of the Crime, nor of one who does nothing, tho' the should utter or let fall some idle or rash Words; for even threatening is a very different Thing from forcibly hindring, wounding or beating.

The Pannels, if it were necessary, might, upon this Head of the Relevancy of Art and Part to inter the statutory Punishment, appeal to the Opinions of the most celebrated Lawyers who have wrote upon Crimes; so *Julius Clarus, lib. 5. § ult. n. 9. Ubi agitur de imponenda pœna alicujus specialis constitutionis, oportet*

oportet quod in illo casu verificetur omnes qualitates in ipsa constitutione expressæ, alias pena non committitur. And to the same Purpose, *Mathæus, tit. de furtis, cap. 3. § 12. Ideo concludimus statuta de hac pena (laquei) loquentiæ strictè interpretanda esse, ita ut si nominatim nihil adjectum sit de conatu, de opem ferentibus, de receptoribus furtum aut rerum furivarum; neque de his neque illis eadem laquei pena infligatur.* And *Voet, tit. de pœnis § 8.* gives the same Opinion.

Nor is this Doctrine contrary to the Act of *James VI.* where a Libel bearing Art and Part is ordained to be found relevant, *First*, Because this will not apply to Crimes that can admit of no Accessories, as consisting in a precise Fact, described and circumstantiated in a certain Way, so as to constitute a Kind of new Species of Crime, created as it were by the Law itself; which is the present Case. And *2dly*, It does not follow from the Statute, That Art and Part shall be punished in the same Manner as the principal Offenders; but only that Accession to a Crime is relevant to infer some Punishment, as Sir *George Mackenzie* observes in his *Criminals, tit. Art and Part § 10.*

This may be likewise illustrated by Examples of other Statutory Crimes, and Accessions to them; as for Instance the Riot Act of the 1st of the late King. Put the Case that a Tumult is assembled, and Proclamation made, that one thereafter joined himself with the Mob almost an Hour after the Proclamation was read, and the Mob continues together till the Hour be expired, and thereby is subjected to the Pains of the Statute; but this new Comer, though he became accessory to the Mob it self or Tumult, yet it could not be pretended, that he had incurred the capi-

capital Pains of that Law, seeing the Proclamation was not read to him, nor did he know that it had been read, or continue an Hour thereafter.

The Pannels therefore hope, that their Objections stand good against the Relevancy of the first Part of the Libel, That the Charge against them not coming up to the Terms of the Statute, neither that Charge, nor the general Allegation of Art and Part thereof, can be sustained for remitting them to an Inquiry, in order to be tried for Transportation.

It was further pleaded for the Pannels by Way of Defence, which they hope there will be no Occasion for, as against this first Part of the Libel, That of the Facts opened for them, these most material Facts they are confident must come out upon a Proof, which will show, that what happened at the Time libelled, comes not up to the Description of the Statute; namely, 1st, That Mr. *Townson* was not forcibly hindred; but that he visited and seized the Boat in which the Pannels were, and thus accomplished and performed all that he came about to do as his Duty. 2^{dly}, That he was not in the due Execution of his Office. 3^{dly}, That there were not Persons armed, even in Company with the Pannels, to the Number of Eight. And 4^{thly}, That they were not tumultuously assembled to that Number. All which Circumstances must concur, (or at least the wounding and beating an Officer joined with the other three) to make up the Crime described and punished by this Statute.

As to the *first* of these, It is unnecessary to insist much upon it, because the Libel alledges the other Alternative of beating to have happened. And tho' it may be true, that hindring, like other ambiguous Words, may have a double Meaning, and among the
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rest that of delaying, which the Pursuers are at Pains to prove : yet it cannot be denied that it also signifies *preventing or disappointing*. Thus in Dr. *Littleton's* Dictionary this Expression, *Tou may binder it if you will*, is thus rendred in *Latin, tibi in manu est ne fiat*, which signifies a total Disappointment. And in the Constrution of a penal Statute, the same is not to be extended or aggravated, but the most benign Interpretation admitted; more especially that in the Nature of the Thing, it would be unreasonable to punish by a high Penalty a little Stop or Delay of doing his Duty; for he that flies or rows away with all his Might from the Custom-house Boat, or he who for some Time refuses to produce or deliver the Key of his Ware-houle, does retard or delay, and in this Sense hinder for a Time the Officer's performing his Duty; and yet he is not punishable by this Law.

As to the *second* Point, That Mr. *Townson* was not in the due Execution of his Office; this is a most essential Circumstance in the Case which was above set forth, That before any Beating happened by any one of the Pannels, the Persons whom the Libel sets forth to have been Mr. *Townson's* Assistants, and who are therefore admitted to be connected with, and to make one Party with him, had either actually killed the deceased Mr. *Frazer*, a single Gentleman unarmed, among their Hands; or at least, were engaged in that violent Manner against him, as gave just Cause or Apprehension of the Mischief which followed; and for which two of these Assistants are already convicted, as guilty of a barbarous Murder, and condemned to Death. But in the present Argument, it is equal to the Pannels what was the Degree of the Offence: For if it had been no more than

than a Piece of Cruelty, that was unnecessary, and an unjustifiable Excess of their Duty; it cannot be said that Mr. *Townson*, whose Followers and Assistants they were, was then acting in the due Execution of his Office. But upon such a cruel and unjustifiable Treatment of the poor Gentleman who was killed, it became allowable, or at least very excusable Conduct, in any one or more of the Persons who had been in the same Boat with Mr. *Frazer*, either by way of Precaution for their own Defence against the like Misfortune with what he suffered, or even if it had been by way of Repentment upon so just a Provocation, to attack or disarm Mr. *Townson*, or any other Person who was under his Command and Direction. And this is what the Pannels must lay a Stress upon, as affording a Defence against the second Branch of the Libel, even in Behalf of any one of them, who shall be proved to have acted any Violence against Mr. *Townson*, as well as it serves for a Defence against the Charge on the Statute, supposing that had been relevantly libelled, as they conceive it is not.

And when this was the Circumstance in which an Act of Violence happened, it can with no Justice be ascribed to a Design of resisting an Officer in the due Execution of his Office, because that was not truly what he was then about, but was executing by his Assistants a most unlawful and cruel Action at least; and that when such Provocation happens, the Violence which ensues ought to be ascribed to that Occasion, and not to a Design against the Officers of the Revenue. The Pannels have the Authority of a Decision of the Court of Justiciary, on the 8th of November 1725, his Majesty's Advocate against *Thomas Anderson*, and others

thers, where the Indictment was laid upon this very Statute, containing also an Alternative, libelling an Offence against the Common Law; and in that Case the Prosecutors gave up the former Part of their Libel, and the Court found the Pannels, or any of them, violently invading the Officers of the Customs mentioned in the Libel, or any of them, or the beating, bruising or wounding any of them, or being Art and Part thereof. Sustained the Defence offered, viz. *That the said Officers, or some of them, did commit Acts of Violence against the Defendants, by whipping or firing a Pistol at some of them, before the said Officers were invaded as aforesaid.*

This also proves the Opinion of that Court, that the Acts of Violence committed by any one of the Officers, did wholly justify the after Violence done against any other of the Officers, though not the very Persons who had done the first. And in the Terms of that Defence, the Pannels do alledge, That before any Violence done by any one of them, Mr. *Townson's* Assistants had either actually given the deadly Wound to Mr. *Frazer*, or at least had begun to commit Acts of Violence against him, which did not cease till he was killed.

3^{dly} It can be proved, in Defence, and is already in Effect admitted by the Pursuers in the Debate and Information, That there were not in the Pannels Company eight Persons armed, or who had Weapons, either in their Hands, or at their Hands; and the Clause of the Statute seems plainly to require this, That the Persons therein described be armed, as well as tumultuously assembled, to the Number of Eight or more. Such is the Letter of the Statute, and so the Meaning and Intention thereof requires it to be understood; which was cer-

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cainly to restrain a Practice that has sometimes prevailed, especially on the Coasts of *England*, where bold and impudent Smugglers go together in armed Bands, in a hostile Manner, and sometimes adventure to engage with Parties of the King's Forces, who are brought to the Assistance of the Officers.

The Sense of the Words, as they stand in the Clause, is most plain and obvious, as may further appear, by applying the same Terms and the same Order to a different Subject: For Example, if it were said, that a commanding Officer in the Army had with him, at such a Place, a Body of Men, armed and regularly drawn up, or assembled, to the Number of 800, or whatever other Number, who could doubt concerning the Meaning of these Words, that they signified, that every one of these Persons, or Body of Men, was provided with Arms?

But further upon this Head, There were not even eight Persons in all in the same Vessel with the Pannels, either armed or unarmed, without reckoning the proper Crew of the Boat, who were neither armed, nor in any Sense whatever tumultuously assembled, being employed in the Execution of their lawful Calling, and cannot be held answerable for, or as Accessories to every unlawful Act, that any Person who hires them, or is a Passenger aboard them, happens to commit. And it is no Answer to this, which is said, That Boat-men, who enter into the Service of Smugglers, are not guiltless of the Accidents which may follow: For in the *first* Place, the Libel only bears, That the Officer suspected this Boat. *2dly*, Though there had been uncustomed Goods aboard it, how were the Boat-men obliged to know that? Is it their Business to be satisfied, or see Vouchers, ~~that~~ the Goods which they are employed to carry have

have paid the King's Duty. And 3dly, Though the contrary had been true, and the Boat-men also had known of it, they were thereby *versantes in illicito*; but he that is accessary to one Transgression, is not therefore guilty of all, or of a much higher Crime that afterwards ensues. Such remote Accession surely falls not within the Statute. And therefore, as it is not libelled, or alledged, that any of the Sailors committed any Violence against the Officer, or his Assistants, the poor Boat-men, who lay quiet upon their Oars, did not act tumultuously, and cannot be brought into the Account, to make up the Number of eight Persons tumultuously assembled, and without the Addition of them, the whole Company that they carried amounted not to that Number.

As to the *last* Article, of tumultuously assembled to the Number of eight; that is also what the Panels deny, and was fully explained above, in stating the Objection to the Relevancy of the Libel: And they cannot help thinking it as absurd as it is unjust, that the violent Actings of one Person, can be sufficient to convert the whole People who were in the same Boat with him into a tumultuous Assembly, and make them liable to severe Penalties as such, though all of them, besides that one Person, behaved themselves quietly and peaceably, without committing one violent or tumultuous Act.

As to the second Part of the Libel, which charges, That *Edward Townson*, a Custom-house Officer, or some of his Assistants, were beat, knocked down, and hindered in the due and lawful Execution of their Offices, and that the Pannels were Art and Part of the same: They did not object to the Relevancy

cy of this to infer an arbitrary Punishment, according to the Degree of every one's Offence or Accession that should be proved; but, denying also this Part of the Libel, it was further offered by way of Defence, That the said *Edward Townson* and his Assistants were not at the Time of the Violence libelled, employed in the due and lawful Execution of their Offices; but had been guilty, or were then actually committing Acts of Violence against the deaceast *Mr. Fraser*, such as were at least an unjustifiable and atrocious Excess of their Duty: And therefore, though the Violences libelled had been then committed by the Pannels, or any of them, the same was not punishable, nor amount to the Crime charged in this Part of the Libel. And, for the Relevancy of this Defence, the Pannels refer to what is above said on that Head, and to the Decision of the Court of Justiciary.

Asto one of the Pannels *Duncan Grant*, against whom it is not pretended that any one positive or covert Act of Violence was committed by him; and as to the Words which he is said to have uttered when the Custom-house Boat was coming up, it is already observed, that these Words were neither forcibly hindering, nor wounding or beating an Officer: And for him these further Circumstances were offered by way of Defence, *1st*, That he did not even step into the Custom-house Boat, till he was first called upon or invited by some one or other of the Crew thereof; and *next*, That after all the Mischief was over, they so far continued to treat him as one whom they look'd not upon as an Enemy or Invader, that they lent him the Custom-house Boat to go therewith to *Inverness*.

Upon

Upon the whole, the Pannels humbly apprehend, that there was no sufficient Foundation for this Prosecution, either upon the Statute libelled, or the other Branch thereof; and that a Case, in which so great a Calamity had fallen out, as the killing, at least unjustifiably, a poor Gentleman, who was single and unarm'd, among the Hands of Mr. *Townson* and his Assistants, was not a proper Case wherein to attempt to stretch, or extend a Statute highly penal, to a Fact that does no Way come up to it. And they hope, that for the Reasons above mentioned, the Honourable Judge of this High Court will find the Libel not relevantly laid upon the Statute: And, as to the second Branch of the Charge, will sustain the Defence, That before, or at the Time of the Violence libelled, Mr. *Townson*, or his Assistants, were otherwise employed than in the due and lawful Execution of their Offices, by committing Acts of Violence against the deceased Mr. *Frazer*, who had been one of the Pannels Company, upon which his Death did instantly ensue.

In Respect whereof, &c.

WILL. GRANT.

Curia Jusficiaria Supreme Curie Admiralitatis, tenta in Prætorio Burgi de Edinburgo, decimo septimo die Novembris MDCCXXV. per honorabilem virum Jacobum Grabant de Airtb, Judicem dictæ curiæ.

Curia legitime affirmata.

Intrans

Intrant Duncan Grant junior Merchant in Inverness,
John MacDonald Messenger there, Evan Mac-
Kinnon Shoemaker there, and Murdoch MacRae
Horse-brier there.

Advocates for the Pursuers.

Mr. Hugh Forbes Procurator-Fiscal.

Mr. Charles Erskine his Majesty's Solicitor.

Mr. Patrick Haldane.

Mr. Hugh Dalrymple.

In Defence.

Mr. Robert Craigie.

Mr. William Grant.

Mr. Alexander Lockhart.

Mr. James Geddes.

The Libel and Informations being read in Presence of the Pannels and Assize, the Judge continues the Diet for pronouncing the Interlocutor till the Morrow at Two a-Clock in the Afternoon, and adjourns the Court till that Time; and ordains the Pannels *MacDonald*, *MacKinnon* and *MacRae*, to be carried back to Prison; and continues *Grant's* Appearance till that Time; and ordains the Witnesses and Assizers to attend the said Diet, each under the Penalty of one hundred Merks.

JAMES GRAHAM.

*Curia Jusficiaria Supremæ Curie Admiraltatis, tenla
in Prætorio Burgi de Edinburgo, decimo octavo die
Novembris, MDCCLXXV. per bonorabilem virum
Jacobum Graham de Airth, Judicem dictæ curiæ.*

Curia legitime affirmata.

Ex-
-al

Intrant

*Intrant Duncan Grant junior Merchant in Inver-
nells, John MacDonald Messenger there, Evan
MacKinnon Shoe-maker there, and Murdoch
MacRae Horse-birer there, indicted and accused
for the Crime of beating, bruising, or invading and
forcibly hindring the Officers of his Majesty's Re-
venue in the due Execution of their Office.*

Advocates for the Pur-
sucs.

Mr. Hugh Forbes Pro-
curator-fiscal.

Mr. Charles Erskine his
Majesty's Solicitor.

Mr. Patrick Haldane.

Mr. Hugh Dalrymple.

In Defence.

Mr. Robert Craigie.

Mr. William Grant.

Mr. Alexander Lock-
hart.

Mr. James Geddes.

The Judge of the High Court of Admiralty ha-
ving considered the Libel at the Instance of his Ma-
jesty's Advocate, and Procurator-fiscal of Court, a-
gainst *Evan MacKinnon* Shoe-maker in *Inverness*,
John MacDonald Messenger there, *Duncan Grant*
junior Merchant there, and *Murdoch MacRae* Horse-
hirer there, Pannels, with the foregoing Debate,
finds the said Pannels, or one or other of them,
their tumultuously assembling the Time and Place
libelled, with others to the Number of eight or
more Persons, armed with Clubs or other Wea-
pons, and forcibly hindring, wounding, and beat-
ing *Edward Townson* Land-waiter, or such as were
acting in his Aid and Assistance, in the due Execu-
tion of his Office, or the Pannels, or one or other
of them, being Art and Part of the said Offences,
relevant to infer the Pains of Law; and repels the
whole Defences proponed for the Pannels against
this

this Article of the Libel. And *Separatim* finds the Pannels, or one other of them, the Time and Place libelled, their beating, knocking down, or hindring the said *Edward Townson*, or such as were acting in his Aid or Assistance, in the due Execution of his Office, or the Pannels, or one or other of them, being Art and Part of the said Offences, relevant to infer an arbitrary Punishment, Damage and Expence: But for eliding this second Article or Branch of the Libel, or for alleviating the Offence therein sustained relevant, allows the Pannels to prove, that before they entred the Boat in which the said *Edward Townson* and his Assistants were, the said *Edward Townson*, or one or other of his Assistants, did commit Acts of Violence against the Pannels, or one or other in Company with them; and repels the whole other Defences proponed for the Pannels against this second Article of the Libel; and remits them, with the said Libel as found relevant, to the Knowledge of an Assize.

JAMES GRAHAM.

A S S I Z E.

William Kier Baxter in *Edinburgh*,
 Patrick Crichton Merchant there,
 James Johnston Merchant there,
 Archibald Hart Merchant there,
 Oliver Tod Merchant there,
 William Millar Merchant there,
 John Forrest Merchant there,
 Alexander Macon Merchant there,
 James Mitchellson Goldsmith there,
 John Brown Watch-maker there,
 Robert Tod Merchant there,
 James Wight Litster there,

George Dunbar Merchant there;
Alexander Maitland Merchant there;
William Hamilton Bookseller there.

The Affize lawfully sworn, and no Objection made,

The Pursuers for proving their Libel adduced the following Witnesses, *viz.*

COMPEARED EDWARD TOWNSON Land-waiter at *Inverness*, married, aged 45 Years or thereby, who being solemnly sworn, purged of partial Council, examined and interrogate, *depones*, That the Time and Place libelled, the Deponent, an Officer of the Customs, in the Custom-house Boat, came up with a Boat in which were the Pannels, and some other Persons, to the Number of thirteen: That so soon as the Deponent came up with the said other Boat, he called out to them, that they should give him Entrance, he being one of the Officers of the Customs, that he might see what they had aboard: That thereupon he was answered by *Duncan Grant* one of Pannels, that they had no Goods aboard but what were enterable; and that if he should come aboard the Boat in which *Duncan Grant* was, that they in the Custom-house Boat, and the Deponent, should repent it; and therefore desired them to go ashore: That in a little after *Hugh Fraser*, one of the Company aboard the other Boat without Arms, *Evan MacKinnon* one of the Pannels, armed with a Pistol, *John MacDonald* and *Murdoch MacRae*, two other of the Pannels, also without Arms, came aboard of the Custom-house Boat, and with their Weight had near over-set the

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said Custom-house Boat, so as that the Deponent and such as were in the Custom-house Boat, were obliged to take Hold of the other Boat to keep them from being overset: That *Fraser* (deceased) and the other three Pannels *MacKinnon*, *MacDonald* and *MacRae*, entered the Custom-house Boat about the same Time, and before any Scuffle happened betwixt *Long* the Corporal, and *MacAdam*, and the said *Hugh Fraser*: That *MacRae* past forward to the Stem of the Boat, where *Brodd* a Soldier was; but whether he fell in Grips with the Soldier or not, the Deponent is ignorant: That *MacKinnon*, who had a Pistol in his Hand, as he came aboard, struck the Deponent over the Head with the Butt End of that Pistol, and knocked him down, and took a Blunderbuss which he had in his Hand from him, and threw it in the Sea; that the Pistol had a Lock upon it; but in what Condition the Lock was the Deponent cannot be positive, only he was informed, that upon opening the Lock the Priming dropt out of the Pan; and that he had this Information from one of the King's Boat-men That after *Hugh Fraser's* Death, the Deponent, with his Assistance, came aboard the other Boat, where he found six Hogheads of Wine, and six half Hogheads of Brandy, which were carried to the King's Warehouse, by Reason there was no Clearance That *Duncan Grant*, one of the Pannels, did not come on board of the Custom-house Boat till after *Hugh Fraser* was stabb'd, and had received his Wound; that he behaved himself peaceably when he came into the Boat, and the Deponent said to him, that he could declare he had done them no Violence: That *Walter Denoon*, while the Deponent and he were in the Prison of *Inverness*, about three Days

Days after the Seizure, told the Deponent, that he had called to *Duncan Grant* to come from the Boat he was in, to the Custom-house Boat to make Peace, and that thereupon the said *Duncan Grant* came: That besides the Wine and Brandy above-mentioned, which was found in the other Boat, the Deponent found a naked broad Sword and a Staff; but to whom the saids Weapons did belong, the Deponent knows not: That of the thirteen Persons on board the other Boat in which the Pannels were, there were six Boat-men and the Skipper: That the Deponent received the Strokes from *MacKinnon*, and had the Blunderbuss taken from him, about the same Time that the said *Hugh Fraser* and the two Soldiers were struggling together: That the Deponent did not see *Mr. Fraser* get his Wound; but that after the Deponent had recovered himself of the Strokes he got from *MacKinnon*, he saw *Fraser* in the Water: That while *Hugh Fraser* deceased, and the three Pannels above-mentioned, *MacKinnon*, *MacDonald* and *MacRae*, were coming from the Boat in which they were, into the Custom-house Boat, the Deponent took up his Blunderbuss in his Hand, and endeavoured to cock it; but whether he actually cocked it or not, or whether the Blunderbuss was load or not, the Deponent cannot tell, by Reason the Blunderbuss did not belong to the Deponent, but to *Ogilvie* the Tide-surveyor, who had left it with the Boat-men of the Custom-house Boat. *Causa scientiæ patet*. And this is the Truth, as he shall answer to GOD.

EDWARD TOWNSON.
JAMES GRAHAM.

Compared JOHN BRODD Soldier in Colonel *Archibald Hamilton's* Regiment of Foot, married, aged thirty three Years, or thereby, who being solemnly sworn, purged of partial Council, examined and interrogate, depones, That Time and Place libelled, the Deponent being in the Custom-house Boat, along with *Edward Townson* Land-waiter, and some others, to the Number of Ten, they came up to another Boat, wherein were the Pannels, and others, to the Number of Thirteen, of which there were six Boat-men and a Skipper. That *Mr. Townson* desired to get aboard of that other Boat, to search after prohibited Goods: That *Duncan Grant* Pannel denied him Access, and declared that they might go ashore, otherwise they would repent it; whereupon *Hugh Fraser* deceased without Arms, *MacKinnon* Pannel, armed with a Pistol in his Hand, *MacDonald* and *MacRae* without Arms, came all of them from the other Boat into the Custom-house Boat much about one Time, *Hugh Fraser* first, and the others following in Order, as close as they could; so that by the Weight of them upon the Side of the Custom-house Boat, she was near overfet; and that the Boat-men of the Custom-house Boat caught hold of the other Boat and kept her up: That while *Hugh Fraser* and two of the Soldiers who were aboard the Custom-house Boat were struggling, *McKinnon* made up to *Townson* the Land-waiter, and struck him on the Head with the But of his Pistol; so that he was beat down, and afterwards took from him a Blunderbuss which he had in his Hand, and threw it into the Sea: That he knows not if the Pistol was loaded or not, or in what Condition the Lock of the Pistol was, but that the Deponent saw that the Pistol was prim'd

prim'd with Powder; and that Two of the Custom-house Boat-men, *Thomas Smith* and *Alexander Wright*, who had the Pistol betwixt them, did shake out the Powder with which it was prim'd out of the Pan: That three of the Boat-men of the other Boat seized the Deponent, and pull'd him out of the King's Boat into the said other Boat: That the Deponent did not see *Duncan Grant* Pannel aboard of the Custom-house Boat till after all was over: That aboard of the other Boat there were found six Hogsheads of Wine, and six halt Hogsheads of Brandy, a naked broad Sword and a Staff, which were carried to the King's Ware-house; and that the Time the Deponent was gripped, *Mr. Frazer* decaft and the two Soldiers were struggling. *Causa Scientie patet.* And this is Truth, as he shall answer to GOD. And declares he cannot write. *And further depones*, That the Skipper of the Seizure-boat having the Tiller or Boat-hook in his Hand, struck one of the Custom-house Boat-men with it over the Shoulder: That the Boat-man's Name who was struck was *Alexander Wright*; and that this happened during the Time of the Struggle. And this is likewise the Truth, as he shall answer to GOD.

JAMES GRAHAM.

Compeared THOMAS SMITH Boat-man of the Custom house Boat at *Inverness*, married, aged Thirtty-six Years or thereby, who being solemnly sworn, examined, purged of partial Council, and interrogate, *depones*, That he was aboard of the Custom-house Boat the Time and Place labelled: That when the Custom-house Boat came up with another Boat in which the Pannels were, *Mr. Townson* Land-waiter called from the Custom-house Boat to the other Boat, and desired

desired to have Entrance to search for prohibited Goods: That *Duncan Grant* Pannel returned him for Answer, *That he should get ashore, otherwise they would repent it,* (meaning those aboard of the Custom-house Boat:) That there were in all ten Men aboard of the King's Boat, and thirteen aboard the other Boat, whereof there were six Sailors and the Skipper: That in a little Time after *Hugh Frazer* deceased, and the three Pannels *MacKinnon*, *MacDonald* and *MacRae*, came aboard of the Custom-house Boat, but which of them came first the Deponent knows not; but that there was such a Weight of them upon the Side of the Custom-house Boat, that she was near overset, which obliged the Deponent, and others of the Custom-house Boat Men, to catch hold of the other Boat, in order to keep the Custom-house Boat up: That about the same Time that *Hugh Frazer* and the two Soldiers were struggling, *MacKinnon*, with a Pistol in his Hand, struck *Townson* the Land-waiter on the Head, and knocked him down, and took from him a Blunderbuss, which he had in his Hand, and threw it into the Sea: That thereafter *Alexander Wright* was struggling with *MacKinnon* to get the Pistol out of his Hand, and the said *Wright* having called the Deponent to his Assistance, he the Deponent took the Pistol out of *MacKinnon's* Hands, and gave it to one of his Comrades, named *Alexander Urquhart*; but the Deponent knows not if the Pistol was primed with Powder: That he saw no Violence committed by the other two *MacDonald* and *MacRae*, who came with *MacKinnon*; nor did the Deponent see that *Duncan Grant* Pannel was aboard the Custom-house Boat at this Time, nor at no Time before *Hugh Frazer* was killed; but that thereafter he was called aboard the

the Custom-house Boat, and that Boat offered to him, to carry Mr. *Frazer* to *Nairn*, in order to get his Wound panced by a Surgeon, for at this Time these in the Custom-house Boat did not know that Mr. *Frazer* was dead, tho' thereafter they were informed that he was dead at that Time: That when Mr. *Townson* went aboard the other Boat, there was found six Hogsheds of Claret Wine, one of White Wine, and an Woolage Cask, and six Half Hogsheds of Brandy, a naked Broad Sword, and a big Staff. *Causa scientiæ patet.* And this is the Truth as he shall answer to God; and declares he cannot write.

JAMES GRAHAM.

Compeared DONALD DINGWALL, another of the Custom-house Boat-men at *Inverness*, married, aged forty Years, who being solemnly sworn, purged of partial Council, examined and interrogate, *Depones*, That after *MacKinnon* had knock'd down *Townson* the Land-waiter with the Pistol, *Thomas Smith* and *Alexander Wright* Boat-men, endeavoured to take the Pistol out of his Hand, whereupon a Struggle ensued, and *Alexander Wright* did actually take the Pistol out of *MacKinnon's* Hand; and in Presence of the Deponent and *Thomas Smith*, who was looking on, he discovered the Pan of the Pistol, and shook out the Priming, which fell upon *Alexander Urquhart's* Coat. *Causa scientiæ patet.* And this is the Truth as he shall answer to God; and declares he cannot write.

JAMES GRAHAM.

Compeared ALEXANDER URQUHART, another of the Custom-house Boat-men at *Inverness*, married, aged Forty two Years, or thereby, who being solemnly sworn, purged of partial Council, examined and

and interrogate, *Depones*, That so soon as the Custom-house Boat came up to the Boat in which the Pannels were, the Deponent observed the Pannel *MacDonald* having a naked Sword under his Arm, but he had it not with him when he came aboard the Custom-house Boat: That after *MacKinnon* had knocked down *Townson*, the Custom-house Officer, two of the Boat-men of the Custom-house Boat, *Thomas Smith* and *Alexander Wright*, struggled with him in order to take the Pistol from him, and *Wright* got into his Hand, whereupon he opened the Frizzle, and shook out Powder out of the Pan, Part of which the Deponent saw upon his own Coat; and thereafter *Smith* having taken the Pistol from *Wright*, gave it to the Deponent: That three Men of the other Boat grappled with *John Brodd*, and by endeavouring to take his Piece from him, pulled him in from the Custom-house Boat to the other Boat, from whence he soon returned with his Piece to the Custom-house Boat, and that these three Persons, whose Names the Deponent does not know, were in their own Boat, but that they were none of the Pannels: And that this happened much about the Time of *MacKinnon's* beating the Officer, and the Struggle betwixt *Hugh Fraser* and the other two Soldiers. *Causa scientiæ patet*. And this is Truth as he shall answer to GOD.

ALEXANDER URQUHART.
JAMES GRAHAM.

Compeared ALEXANDER WRIGHT, another of the Custom-house Boat-men at *Inverness*, married, aged Forty Years or thereby, who being solemnly sworn, purged of Partial Council, examined and interrogate, *Depoones*, That after *MacKinnon* had beat down *Townson* the Officer with the Pistol, the

the Deponent gripped *MacKinnon*, in order to wrest the Pistol from him, and forthwith opened the Frizel of the Pistol, and turned it Sideways to shake out the Priming out of the Pan, in case there should be any in it; the Deponent having called *Thomas Smith* to his Assistance, in order to take the Pistol out of *MacKinnon's* Hand, which he himself was not able to do, *Smith*, with the Deponent's Assistance, took the Pistol out of *MacKinnon's* Hand: That at the Time of the Deponent's opening of the Frizel of the Pistol, and the discovering of the Pan, he did not observe that there was Priming in the Pan of the Pistol, being in such a Hurry, but he was informed by others, that some Powder was found upon the Cloaths of one of the Crew: That so soon as *Smith* had got the Pistol in his Hand, he immediately threw it down into the Boat. *And further depones*, That about this Time of the Struggle betwixt the Deponent and *MacKinnon*, the Skipper of the other Boat struck the Deponent on the Shoulder with the Filler of the Boat, or the Handle of the Rudder. *Causa scientiæ patet*. And this is the Truth as he shall answer to GOD.

ALEXANDER WRIGHT.
JAMES GRAHAM.

The Judge of the High Court of Admiralty ordains the Affize forthwith to inclose, and to return their Verdict against To-morrow at Twelve o'Clock in the Forenoon, and the haill Fifteen to attend at that Time, each Person under the Penalty of Two hundred Merks, and continues the Diet till that Time, and ordains the Pannels *MacDonald*, *MacKinnon* and *MacRae*, to be carried back to Prison, and continues *Grant's* Bail till that Time.

U JAMES GRAHAM.
Curia

*Curia Jusliciarum Supremæ Curie Admiralitatis,
tenta in Prætorio Burgi de Edinburgo, Decimo nono
die Novembris MDCCXXXV. per honorabilem virum
Jacobum Grabam de Airtb, Jadicem dictæ curiæ*

Curia legitime affirmata.

*Intrant Duncan Grant, John MacDonald, Evan
MacKinnon, and Murdoch MacRae, Pannels, in-
dicted and accused, ut ante.*

Advocates for the Pur-
suers.

Mr. Hugh Forbes Advo-
cate, Procurator-fiscal.
Mr. Charles Erskine.
Mr. Hugh Dalrymple.
Mr. Patrick Haldane.

In Defence.

Mr. Robert Craigie.
Mr. William Grant.
Mr. Alexander Lock-
hart.
Mr. James Geddes.

The said Day the Jury returned their Verdict,
whereof the Tenor follows.

“ At *Edinburgh* the Eighteenth Day of *Novem-
ber*, One thousand seven hundred and thirty five
“ Years; the above Assize having inclosed, and
“ chosen *James Johnston* their Chancellor, and
“ *John Forrest* their Clerk, and having considered
“ the Libel, at the Instance of *Duncan Forbes Esq;*
“ His Majesty’s Advocate, and Mr. *Hugh Forbes*
“ Procurator-fiscal of the High Court of Admiral-
“ ty, against *Duncan Grant, Evan MacKinnon, John*
“ *MacDonald* and *Murdoch MacRae* Pannels, the
“ Judge of the High Court of Admiralty his Inter-
“ locutor relative thereto, and Depositions of the
“ Witnesses for proving of the same, are unanimou-
ly

" ly of Opinion, That the first Part of the Libel and
 " Interlocutor is not proven against any of the Pannels; and by Plurality of Voices find, That in
 " Respect of the Provocation given, none of the
 " Pannels are guilty of the Crimes contained in the
 " second Part of the Libel and Interlocutor. In
 " Witness whereof, these Presents, written by the
 " said *John Forrest* Clerk, are subscribed by the said
 " Chancellor and Clerk, Day and Place above
 " written.

JAMES JOHNSTON Chancellor.
 JOHN FORREST Clerk.

" The Judge of the High Court of Admiralty
 " having considered the above Verdict of the Assize, in Respect thereof assails the said *Duncan Grant*, *John MacDonald*, *Evan MacKinnon* and
 " *Murdoch MacRae* Pannels, and dismisses them
 " from the Bar; whereupon they took Instruments
 JAMES GRAHAM.

F I N I S.

